92-1410

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ELENA RUTH SASSOWER and DORIS L. SASSOWER,

Petitioners,

v.

KATHERINE M. FIELD, CURT HAEDKE, LILLY HOBBY, WILLIAM IOLONARDI, JOANNE IOLONARDI, ROBERT RIFKIN, individually, and as Members of the Board of Directors of 16 Lake Street Owners, Inc., HALE APARTMENTS, DeSISTO MANAGEMENT, INC., 16 LAKE STREET OWNERS, INC., ROGER ESPOSITO, individually, and as an officer of 16 Lake Street Owners, Inc.

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether fee-shifting under inherent power against civil rights plaintiffs is barred by retroactivity and preemption, where an award under the Fair Housing Act, as amended after the action was commenced, could not be sustained under the Christiansburg standard?

2. Whether fee-shifting under inherent power may be used as a backup to uphold awards under Rule 11 and 28 U.S.C. §1927, which do not meet the standards of those provisions?

3. Whether fee-shifting under inherent power against civil rights litigants requires due process and the right to trial by jury, neither of which was afforded?

4. Whether fee-shifting under inherent power violates equitable rules of "unclean hands" and "unjust enrichment", where the fully-insured defendants did not controvert plaintiffs' 60(b)(3) motion[1] and never claimed to be acting on the insurer's behalf in making their post-trial fee applications?

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[1] Plaintiffs respectfully submit that the question of their entitlement to the granting of their Rule 60(b)(3) motion, as a matter of law, be subsumed within this question.

TABLE OF CONTENTS

QUESTIONS PRESENTED

TABLE OF AUTHORITIES

OPINIONS BELOW..... 1

JURISDICTION..... 1

STATUTES AND RULES INVOLVED..... 1

STATEMENT OF THE CASE..... 2

Overview..... 2

Factual Background..... 3

The Opinion of the District Court..... 6

Appeal to the Circuit Court..... 9

The Opinion of the Circuit Court.....10

Petition for Rehearing and Suggestion for Rehearing En Banc.....13

REASONS FOR GRANTING THE WRIT.....14

POINT I

The Judicial Remedy Of Fee-Shifting Under Inherent Power Is Barred By Retroactivity And Preemption 16

POINT II

The Use Of Inherent Power To Uphold Deficient Fee-Shifting Awards Under Rule 11 and 28 U.S.C. §1927 Violates The Standards of Those Provisions, The Rules Enabling Act And Constitutional Separation of Power.....19

POINT III

Inherent Power, As Applied By The Second Circuit, Violates Fundamental Constitutional Rights And Decisional Law Of This Court.....21

A. The Fifth Amendment: Due Process.....21

B. The Seventh Amendment: Trial By Jury.....23

POINT IV

The Circuit Court's Use Of Equitable Inherent Power Is Unrestrained By Equitable Considerations Of "Unclean Hands" And "Unjust Enrichment".....24

POINT V

The Second Circuit's Discriminatory Use of Inherent Power Raises Serious And Substantial Questions As To Denial Of Equal Protection Of Law.....26

EPILOGUE.....28

CONCLUSION.....29

APPENDIX:

Fair Housing Act of 1968:
42 U.S.C. §3612(c).....CA-1

Fair Housing Amendments Act of 1988
42 U.S.C. § 3613(c).....CA-1

Rule 60(b).....CA-2

Rule 11.....CA-2

28 U.S.C. §1927.....CA-3

Rule 17.....CA-3

Rule 19.....CA-4

28 U.S.C.§2072.....CA-5

Fifth Amendment.....CA-5

Seventh Amendment.....CA-5

August 13, 1992 Circuit Court Opinion.....CA-6

August 13, 1992 Circuit Court Order,
affirming Judgment.....CA-20

August 13, 1992 Circuit Court Order,
denying plaintiffs' jurisdictional motion
to vacate Judgment.....CA-22

August 13, 1991 Judgment of the District Court.....CA-23

September 25, 1992 Circuit Court Order,
denying plaintiffs' Petition for Rehearing.....CA-25

October 1, 1992 Circuit Court Order,
denying plaintiffs' motion
to supplement the record.....CA-26

Extract from September 5, 1990 Opinion of the
District Court, denying summary judgment
to the defendant Co-Op.....CA-27

August 12, 1991 Opinion of the District Court,
awarding counsel fee sanctions to defendants.....CA-28

Legal Authorities cited in plaintiffs' Petition
for Rehearing and Rehearing En Banc with which
the Circuit's Court's Opinion conflicts.....CA-56

Listing of Doris L. Sassower in
Martindale-Hubbell Law Directory.....CA-57

ABBREVIATION GUIDE

CA-.....Certiorari Appendix

A-.....Plaintiffs' Circuit Court Appendix

AA-.....Defendants' Circuit Court Appendix

Br.....Plaintiffs' Circuit Court Brief

R. Br.....Plaintiffs' Circuit Court Reply Brief

LDF Br.....Amicus Curiae Brief of NAACP Legal Defense and Educational Fund

Note: Plaintiffs' Rule 60(b)(3) motion consisted of the following documents, citation to which has been abbreviated in their Petition for Certiorari:

5/16/91 Memorandum of Law

7/1/91 Supplemental Memorandum of Law

7/1/91 Notice of Motion

7/1/91.....Affirmation A: Part 1 *(factual rebuttal to counsel fee/sanction motion of Lawrence Glynn, Esq.)*

7/1/91.....Affirmation A: Part 2 *(factual presentation in support of Rule 60(b)(3) motion)*

7/1/91.....Affirmation B: *(factual rebuttal to counsel fee/sanction motion of Dennis Bernstein, Esq.*

7/1/91.....Affirmation C: *(factual rebuttal to counsel fee/sanction motion of Marshall, Conway & Wright*

7/1/91.....Affirmation D: *(factual rebuttal to counsel fee/sanction motion of Diamond, Rutman & Costello)*

3 Compendia of Exhibits

7/19/91 Reply Affirmation

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Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988)

Brocklesby Transport v. Eastern States Escort, 904 F.2d 131, 133 (2d Cir. 1990).

Browning Debenture Holders' Committee v. Dasa Corp., 560 F.2d 1078 (2nd Cir. 1977)

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533 (1991)

Chambers v. Nasco, ____ U.S. ____, 111 S.Ct. 2123 (1991), reh. denied, ____ U.S. ____, 112 S.Ct. 12 (1991)

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)

City of Burlington v. Dague, ____ U.S. ____, 112 S.Ct. 2638 (1992)

Curtis v. Loether, 415 U.S. 189 (1974)

Faraci v. Hickey-Freeman Co. Inc., 607 F.2d 1025 (2d Cir. 1979)

Fleischmann Distilling Corporation v. Maier Brewing Co., 386 U.S. 714 (1967)

Garner v. State of Louisiana, 368 U.S. 157 (1961)

Haines v. Kerner, 404 U.S. 451 (1972)

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)

G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (en banc)

Holt v. Virginia, 381 U.S. 131 (1965)

Keystone Driller Co. v. General Excavator Co, 290 U.S. 240 (1933)

Link v. Wabash Railroad Co., 370 U.S. 626 (1962)

Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1991)

In Re Murchison, 349 U.S. 133 (1955)

New York Association for Retarded Children v. Carey, 711 F.2d 1136 (1983)

Oliveri v. Thompson, 803 F.2d 1265 (2nd Cir. 1986)

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)

Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978)

Thompson v. City of Louisville, 362 U.S. 199 (1960)

Transmission Parts Corp. v. Ajac, 768 F.2d 1001 (9th Cir. 1985)

Tull v. United States, 481 U.S. 412 (1987)

United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949)

Willy v. Coastal Corp., ____ U.S. ____, 112 S.Ct. 1076 (1992)

Withrow v. Larkin, 421 U.S. 35 (1935)

OTHER AUTHORITIES

Legislative History of the Fair Housing Amendments Act of 1988, House Report No. 100-711, H.R. 1158

"Resolution on Bias in the Federal Judiciary", Report of the Proceedings of the Judicial Conference of the United States, September 22, 1992

Baylor Law Review, "The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions", [by Judge Sam D. Johnson, Fifth Circuit] Vol. 43 (1991) at 652-654, 669-670

Harvard Law Review, "Leading Cases: Courts' Inherent Power to Sanction in Diversity Cases", Vol. 105 (Nov. 1991), 349-360

Indiana Law Journal, "The Heileman Power: Well-Honed Tool or Blunt Instrument?", Vol. 66 (1991), 977-998

John Marshall Law Review, "G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.: The Seventh Circuit Approves the Exercise of Inherent Authority to Increase a District Judge's Pre-Trial Authority Under Rule 16", Vol. 23 (1990), 517-535

Nova Law Review, "Sanctions and the Inherent Power: The Supreme Court Expands the American Rule's Bad Faith Exception to Fee Shifting--Chambers v. Nasco, Inc.", Vol. 16 (1992), 1527-1566

Tulane Law Review, "Chambers v. Nasco, Inc.: Moving Beyond Rule 11 into the Unchartered Territory of Courts' Inherent Power to Sanction", Vol. 66 (1991) 591-603

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KATHERINE M. FIELD, CURT HAEDKE, LILLY HOBBY, WILLIAM IOLONARDI, JOANNE IOLONARDI, ROBERT RIFKIN, individually, and as Members of the Board of Directors of 16 Lake Street Owners, Inc., HALE APARTMENTS, DeSISTO MANAGEMENT, INC., 16 LAKE STREET OWNERS, INC., ROGER ESPOSITO, individually, and as an officer of 16 Lake Street Owners, Inc.

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners ELENA RUTH SASSOWER and DORIS L. SASSOWER respectfully pray that a Writ of Certiorari issue to review the Opinion and Orders of the Court of Appeals for the Second Circuit entered in the above-entitled proceeding on August 13, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Second Circuit is reported at 973 F.2d 75 (2nd Cir. 1992) and appears in the Appendix hereto at CA-6[1]. The District Court's Opinion, granting defendants' motions for a fee award and denying plaintiffs' motion for a new trial under Rule 60(b)(3) and for Rule 11 sanctions, is reported at 138 F.R.D. 369 (S.D.N.Y. 1991) and appears at CA-28.

JURISDICTION

The Order of the Court of Appeals affirming the Judgment of the District Court was entered on August 13, 1992 (CA-20). The Order denying plaintiffs' motion to vacate the Judgment on jurisdictional grounds was entered on the same date (CA-22). The Order denying plaintiffs' Petition for Rehearing and Suggestion for Rehearing En Banc was denied on September 25, 1992 (CA-25). The Order denying plaintiffs' motion to expand the record was denied on October 1, 1992 (CA-26). Justice Clarence Thomas granted petitioners' motions to extend their time to seek certiorari up to and including February 22, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The constitutional, statutory, and rule provisions relied on by Petitioners are: The Fair Housing Act of 1968: 42 U.S.C. §3612(c); The Fair Housing Amendments Act of 1988, 42 U.S.C. §3613(c); Rule 60(b)(3); Rule 11; 28 U.S.C. §1927; Rule 17; Rule 19; 28 U.S.C. §2072; The Fifth and

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[1] "CA-" stands for the "Certiorari Appendix", which is annexed hereto. A guide to other abbreviations herein appears at the end of the Table of Contents.

Seventh Amendment to the U.S. Constitution. The text of these provisions is set forth in the Appendix (CA-1-5).

STATEMENT OF THE CASE

Overview

This Petition seeks review of what the Court of Appeals for the Second Circuit describes as "the extraordinary remedy of an award of nearly $100,000 assessed against pro se litigants, occasioned by extraordinary conduct" (CA-8).

The *"extraordinary remedy"* is the Second Circuit's invocation of inherent power to fee-shift a totality of litigation costs against civil rights plaintiffs after it rejected the District Court's post-trial fee-shifting award under the Fair Housing Act (CA-12-14), as well as its alternate fee-shifting awards under Rule 11 and 28 U.S.C. §1927, fixed in the identical aggregate amount (CA-14-16).

The *"extraordinary conduct"* deemed sanctionable under inherent power is not specified by the Second Circuit (CA-14, 16-17) and was not the subject of any specific findings of fact by the District Court. No hearing was held by the District Court to determine the facts as to any alleged sanctionable conduct, liability therefor, or the monetary amount of the sanction (CA-31). Each of these issues was sharply disputed by plaintiffs, who requested an evidentiary hearing if defendants' fee applications were not denied as a matter of law.

This Petition seeks review of the Second Circuit's Opinion (CA-6-19) and Order (CA-20) affirming the Judgment of the District Court (CA-23-24). The awards therein, in wholly arbitrary monetary amounts, represent a *"windfall"* to insured defendants, whose legal defense costs were fully paid by State Farm Insurance Company ("State Farm").

This Petition also seeks review of the denial of plaintiffs' uncontroverted Rule 60(b)(3) motion, which established that defendants' status as "prevailing" parties

under the Fair Housing Act was due to fraud and prejudicial discovery misconduct by them and their counsel, knowingly underwritten by their insurer.

Factual Background

In August 1988, plaintiffs, two single Jewish women, represented by counsel, brought this action under the Fair Housing Act of 1968 (CA-1) and the New York State Human Rights Law to redress prohibited housing discrimination on the basis of sex, religion, and marital status in connection with their purchase of a cooperative apartment. Joining them as co-plaintiff was their seller[2], who at the time of plaintiffs' purchase contract was president of the Co-Op's board of directors. The co-plaintiff was represented by counsel of his own.

As recognized in the District Court's Opinion denying summary judgment to the defendant Co-Op (CA-27), but unmentioned in its Opinion awarding counsel fee/sanctions to defendants (Br. 22-23; R. Br. 11), a document entitled "Guidelines for Admission" ("the Guidelines") was central to plaintiffs' case. The Guidelines--part of an admissions package disseminated to prospective purchasers, including plaintiffs (A-87)--were explicitly intended for "applications involving minorities or single women" and called upon the Co-Op "to articulate its valid reasons for rejection...contemporaneously with the making of the decision to reject..." (CA-27).

Exhibits to plaintiffs' complaint documented the fact that the Co-Op had failed and refused to provide plaintiffs with "contemporaneous reasons" for rejection of their purchase application (Ex. "D") and, thereafter, gave reasons which plaintiffs documented to be false and pretextual (Ex.

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[2] As used hereinafter, the word "plaintiffs" refers to the Sassower plaintiffs only. The seller was permitted to withdraw before completion of discovery, over plaintiffs' objections.

which plaintiffs documented to be false and pretextual (Ex. "F"). Plaintiffs' written request for reconsideration based on such proof was denied by the Co-Op, again without reasons (Ex. "G").

After service of plaintiffs' complaint, defendants denied the existence of the Guidelines (A-85-6), variously claiming that the Guidelines were not disseminated and, if disseminated (A-87), that such dissemination by the managing agent was without their knowledge and unauthorized (A-149-153) and, in any event, that the Guidelines had not been adopted (A-143) and, if adopted in the past (A-150), not adopted by the particular Co-Op board members who rejected plaintiffs' purchase application (A-142-3).

Defendants similarly disavowed other relevant Co-Op policies and procedures, which the co-plaintiff seller, as a member of the Co-Op board since its inception and its president for several years thereafter, had identified to exist (A-162). In face of such denials, pre-trial discovery was critical to proving the facts of plaintiffs' case, as well as to impugn defendants' credibility as to their pretextual defenses.

Plaintiffs' Rule 60(b)(3) motion detailed a pattern of concerted discovery misconduct by defendants and their four separate defense counsel. That motion, seeking relief as well under the court's inherent power, was fully documented by: (a) deposition transcripts showing defendants' admissions and refusals to answer critical questions; and (b) defendants' responses, signed by their counsel, to plaintiffs' document demands.

Through such documentation, plaintiffs established that defendants had deliberately destroyed and withheld material information and documents, including:

> (a) information relating to the adoption and dissemination of the Guidelines (Br. 17, 52-53; R. Br. 21-21-2, 26; A- 85-7; A-143, A-280)

(b) statistical data as to the number of Board-approved purchasers of apartments in the Co-Op who were Jews and/or single women (Br. 17, 24, 52, A-210-215);

(c) completed purchase applications of all apartment purchasers in the Co-Op (Br. 16-17, 52, fn. 47.; R. Br. 26).

Plaintiffs also showed that the Magistrate, sua sponte, had closed discovery immediately following their successful Rule 37 motion against one defendant and his counsel and that the District Court refused to adjudicate plaintiffs' timely-filed Objections thereto, documenting the similar discovery misconduct of the other defendants and their counsel. Such Objections, supported by deposition extracts, were ***uncontroverted*** (Aff. A-Part 2: pp. 4-13).

As a result, plaintiffs were deprived of documents and information essential to presenting their case to the jury, which brought in an adverse verdict--including a special finding that the Guidelines had not been adopted (R. Br. 26, AA-272).

The defense misconduct documented by plaintiffs' 60(b)(3) motion was additionally asserted as an "unclean hands defense" in opposition to the four separate pending post-trial fee applications of defense counsel--which plaintiffs challenged in all respects by a fully documented paragraph-by-paragraph rebuttal, set forth as part of their Rule 60(b)(3) motion. Plaintiffs' showed that such fee applications, unsupported by corroborating affidavits of the defendants or their insurer[3] or by contemporaneous time records, were factually false and perjurious, as well as legally frivolous.

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[3] Such lack of documentation included the failure of counsel for the defendant Co-Op to in any way substantiate his claim that the $100 per hour rate he had received from the insurer was only "partial" payment--leaving a "balance due of $150.00 per hour" (AA-17).

Based thereon, plaintiffs requested Rule 11 sanctions (7/1/91 Notice of Motion).

As a threshold issue in opposition to defense counsel's fee applications, plaintiffs objected that the insured defendants, whose defense costs had been fully paid by State Farm, were not the "real parties in interest" and that the insurer was a "necessary party". Plaintiffs pointed out that defense counsel made no claim to be acting on the insurer's behalf and that they and/or the defendants were seeking a *"windfall"* for themselves (Memos of Law: 5/16/91, 7/1/91).

Plaintiffs also sought sanctions against State Farm for knowingly financing a defense strategy of discovery misconduct (7/1/91 Notice of Motion; Aff. A-Par. 2: p. 4; Aff. C: p. 2; Aff. D: p. 2). This included their payment of the cost of defending against plaintiffs' aforesaid successful Rule 37 motion, as well as the $8,000 sanction which the Magistrate awarded thereunder to plaintiffs (Aff. D: p. 21-3).

Defendants did *not* respond either in defense of their fee applications or in opposition to plaintiffs' motion for sanctions and 60(b)(3) relief and offered *no* documentation as counter-proof. Three of the defense law firms defaulted entirely, with the fourth, counsel for the Co-Op, submitting a five-page affirmation refusing to respond (Br. 32-3).

Although plaintiffs served copies of their Rule 60(b)(3) motion on the non-party State Farm, giving it notice of their "real party in interest" objection to the insured defendants' fee applications (A-82-3), State Farm expressly "decline[d] to become a party..., intervene or appear" (A-81). It likewise "declined[d]" to produce documentation as to its contractual arrangements for legal defense and payments for same (A-81). The District Court denied plaintiffs' request for a "so-ordered" subpoena of State Farm's records and an "evidentiary hearing" (A-80, 84).

The Opinion of the District Court

The District Court summarily denied plaintiffs' jurisdictional objections based on "real party in interest"

(Rule 17(a)) and "necessary party" (Rule 19).

Without addressing plaintiffs' *uncontroverted* factual rebuttal to defendants' fee applications or plaintiffs' "unclean hands" defense thereto, the District Court summarily granted an award of nearly $100,000 as counsel fee/sanctions "to be paid directly to the defendants" (CA-50). Plaintiffs' *uncontroverted* Rule 60(b)(3) motion was summarily denied.

The District Court granted the award to defendants under the Fair Housing Act (CA-32-33), as amended after the action was commenced--the amendment no longer limiting fee awards to "a prevailing plaintiff" (CA-1). The counsel fees awarded were "lump-sums", rather than "lodestar" calculations, without specification of: (a) the number of hours for which defense counsel was being compensated; (b) the rates therefor; (c) the reasonable or market value of the services rendered; or (d) the necessity of the alleged services (CA-50-52). Nor was any determination made by the Court as to the respective financial abilities of the parties.

Liability for the $92,000 fee award under the Fair Housing Act was not assessed against plaintiffs' seller, an original co-plaintiff to the action (CA-48).

The District Court devised alternate fee-shifting awards against plaintiffs "on the possibility that the awarding of attorneys' fees to the prevailing party pursuant to the Fair Housing Act is not upheld on appeal" (CA-52). Such alternate awards, also without any hearing prior thereto, consisted of $50,000 under Rule 11, uncorrelated to defense costs of any alleged Rule 11 violation[4], and $42,000 under 28

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[4] Notwithstanding that the District Court cited Business Guides v. Chromatic Communications, 498 U.S. 533 (1991), its Opinion made the following statement as to its Rule 11 award:

> These sanctions are not directly connected with the fees expended by the defense attorneys nor can they be prorated in that fashion. We find that the appropriate sanction against the plaintiffs for commencing and prosecuting this meritless litigation is the sum of

U.S.C. §1927, uncorrelated to "excess costs" for any alleged violation thereunder (CA-52-53). Taken together, the Rule 11 and 28 U.S.C §1927 sanction awards were in the identical $92,000 sum as the counsel fees awarded by the District Court's award under the Fair Housing Act[5].

Expressly absolved from liability for such alternate awards were all counsel who had represented plaintiffs during the litigation and who had signed the complaint (which plaintiffs had not) and other documents (CA-36-37, 43-45). In assessing the entire $92,000 fee sanction solely against plaintiffs, the District Court made no differentiation between them as to their separate liability based on individual culpability (CA-35-36, 42-43).

The District Court noted that to the extent plaintiffs' conduct was not sanctionable under Rule 11 and §1927, such conduct--which was not specified--could be sanctioned under inherent power, citing Chambers v. Nasco, ____ U.S. ____, 111 S.Ct. 2123 (1991) (CA-36, 41). It did not state, however, that it was invoking its inherent power, and defense counsel made no request for such relief in their motion papers (AA-1, AA-70, AA-95, AA-146).

The District Court's Opinion, sua sponte, incorporated false and defamatory dehors-the-record hearsay matter not presented before it either by counsel or the parties concerning, inter alia, plaintiff Doris Sassower (see, particularly, fn. 11, fn. 13 (CA-38-39, 42). This was done without notice to plaintiffs or opportunity to be heard with respect thereto[6].

$50,000. (CA-52)

[5] The award under the Fair Housing Act included an additional $1,350 for "expenses", which is not a component of the alternate Rule 11 and §1927 awards.

[6] Included in the Appendix hereto is the Martindale-Hubbell listing of Doris L. Sassower, which was part of the record before the District Court (CA-57-59).

The Judgment entered by the District Court (CA-23-24) was based solely on its award under the Fair Housing Act, its decretal paragraphs directing payment to the various defendants in accord with the allocations made thereunder (CA-50-52). No decretal directions were made for payment in accordance with the allocation provisions of the alternate Rule 11 and §1927 awards to the various defendants which were in markedly different amounts (CA-52-53)[7].

Appeal to the Circuit Court

Before perfecting their appeal, plaintiffs moved before the Court of Appeals to vacate the fee award based on their jurisdictional objections that the insured defendants were not the "real parties in interest" and that the insurer was a "necessary party" (11/27/91 motion, pp. 7-10) (Br. 42-3) (Reply Br. 2-8) (CA-22). Rather than adjudicating that motion, the Court of Appeals referred it "to the panel that will hear the appeal" (CA-22). This necessitated plaintiffs' prosecution of their appeal.

Plaintiffs' appellate brief contended and documented that:

> ...the district court's findings and conclusions are so unsubstantiated and actually disproven by the Record, and its legal positions so aberrant, illogical and unjust that they are explicable only as a reflection of its hostility and bias toward Plaintiffs. (Br. 2)

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[7] To the defendant Co-Op, the alternate award is $45,000 as compared to $50,850 awarded under the Fair Housing Act; to defendant Hale, the alternate award is $15,333 as compared to $12,500; to defendant Esposito, the alternate award is $15,833 as compared to $18,000; to defendant DeSisto Management, the alternate award is $15,833 as compared to $12,000.

Plaintiffs further argued that the District Court's sua sponte reliance on false and defamatory dehors-the-record material was itself so violative of due process as to mandate reversal as a matter of law (Br. 54 and errata sheet).

Plaintiffs' Reply Brief documented that defense counsel's inadequate and unsubstantiated appellate submission entitled plaintiffs to Rule 11 sanctions and costs (R. Br. 1-2, 19).

The NAACP Legal Defense and Educational Fund's amicus brief supporting plaintiffs' appeal argued that a fee award against plaintiffs was not sustainable under any theory of liability--regardless of whether the 1988 amendment to the Fair Housing Act was retroactive (LDF Br. 3). On the issue of discovery, the crucial importance of which was the gravamen of plaintiffs' Rule 60(b)(3) motion, the amicus stated:

> Virtually all intentional discrimination cases share certain characteristics in terms of the locus of evidence and actual knowledge of the motives of the charged party...virtually all relevant evidence, particularly documentary, is in the possession of the defendant. (LDF Br. 4)

The Opinion of the Circuit Court

The Court of Appeals summarily denied, without reasons or citation of law, plaintiffs' jurisdictional motion to vacate the fee award (CA-22).

Its Opinion did not cite a single reference to the factual record independent of the District Court's Opinion. Included by the Circuit Court was the same false and defamatory dehors-the-record material that had been incorporated by the District Court, with further false and defamatory dehors-the-record matter, added sua sponte by the

Circuit Court[8]. None of plaintiffs' arguments were identified or discussed. Instead, they were cumulatively dismissed in a single catch-all statement as "totally lacking in merit" (CA-18).

The Circuit Court affirmed the Judgment against both plaintiffs as to liability, albeit it could not sustain the fee award under the Fair Housing Act because:

> ...the plaintiffs' suit adequately alleged the elements of a prima facie case of discrimination and presented a factual dispute for the jury as to whether the plaintiffs had proven that the defendants' articulation of non-discriminatory reasons was pretextual...There is no finding that the plaintiffs did not believe that they had been the victims of discrimination. Moreover,...there is no finding that the plaintiffs' had given a false account of the basic facts alleged to support an inference of discriminatory motive. Nor is this a case where the trial judge expressed the view that no reasonable jury could have found in plaintiff's favor but reserved ruling on a motion for a directed verdict and submitted the case to the jury simply to have a verdict in the event that a court of appeals might have disagreed with his subsequent ruling to set aside a plaintiffs' verdict, had one been returned... (CA-13)

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[8] At the outset of its Opinion (CA-8), the Circuit Court refers to a New York Law Journal headline, "Attorney Sanctioned by Court of Appeals", the innuendo being that the attorney sanctioned was the plaintiff herein, Doris Sassower. In fact, the attorney referred to by that headline was not plaintiff, but someone totally unconnected with plaintiffs and this matter.

Also rejected was the alternate Rule 11 award because the District Court had failed to identify any offending documents, as Rule 11 requires (CA-14). Rejected as well was the District Court's §1927 sanctions award against the non-lawyer plaintiff, Elena Sassower (CA-15-16).

Nonetheless, the Circuit Court kept the entire $92,000 monetary award intact, stating:

> Judge Goettel *explicitly relied*...on his inherent authority in the portion of his Opinion awarding Rule 11 sanctions and...section 1927 sanctions... (CA-16) (emphasis added)

That statement was immediately followed by one showing that the Circuit Court was relying on inference as to what the District Court actually did:

> We may reasonably *infer* that [the district judge] intended to base the $50,000 portion of the award, alternatively, on his inherent authority, to whatever extent it was not supportable by Rule 11, and to base the $42,000 portion of the award, alternatively on his inherent authority, in the event section 1927 was deemed inapplicable to Elena Sassower. (CA-16-17) (emphasis added)

The Circuit Court did not identify what was being sanctioned under the $50,000 figure, the former Rule 11 sanction award (CA-14, 16-17). Nor did it cite any conduct by Elena Sassower warranting conversion of the §1927 liability against her to one under the court's inherent power (CA-14-17).

The Circuit Court affirmed the District Court's §1927 sanction against plaintiff Doris L. Sassower, holding her liable for an undefined portion of the $42,000 awarded thereunder, which was uncorrelated to any specific misconduct by her (CA-14-16). Like the District Court, the

Circuit Court made no distinction based on the fact that Doris Sassower, although a lawyer, was for the most part represented by counsel, upon whom such sanction was not imposed.

Disregarding the District Court's omission of any decretal provisions in the Judgment as to the different amounts payable to the defendants under the alternate awards, as compared to those under the Fair Housing Act award, the Circuit Court "affirmed" the Judgment as against plaintiff Doris Sassower, vacating it only as to amount with respect to plaintiff Elena Sassower, as to whom the Judgment was remanded for determination of her financial ability (CA-17-19).

Also affirmed was the Circuit Court's denial of plaintiffs' *uncontroverted* Rule 60(b)(3) motion, adopting the identical conclusory language as the District Court[9].

Petition for Rehearing and Suggestion for Rehearing En Banc

The Second Circuit denied plaintiffs' Petition for Rehearing and Suggestion for Rehearing En Banc (CA-25).

While the Petition for Rehearing was pending, State Farm moved to intervene before the District Court. The basis for such belated application was State Farm's claim that defense counsel were refusing to turn over to the insurer the proceeds of the counsel fee sanctions award that the District Court had directed plaintiffs to pay "directly to the defendants" (CA-50). Plaintiffs, therefore, moved before the Circuit Court to expand the appellate record to include this further proof that defendants' fee applications were not made on behalf of the insurer as the "real party in interest". The Circuit Court summarily denied that motion (CA-26).

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[9] The Circuit Court repeated almost verbatim (CA-18) the misstatement of the District Court (CA-53), inter alia, that plaintiffs' Rule 60(b)(3) was supported by "a thousand pages of exhibits". In fact, the motion was supported by 69 discrete exhibits totalling fewer than 300 pages.

REASONS FOR GRANTING THE WRIT

Inherent power, as expanded by the Second Circuit, has not only injured the civil rights plaintiffs, who were thereby made the victims of a gross injustice, but directly impacts on all federal litigants and their lawyers. No longer can they rely on rules and statutes, whose standards provide protection from the undefined discretion and vagaries of individual judges.

What is here involved is so extreme a misapplication of existing rules and statutory provisions as to be a compelling catalyst for remedial action to define and limit inherent power.

This case is a microcosm of the very issues now under study by this Court in connection with the proposed amendments to the Federal Rules of Civil Procedure--Rule 11, discovery, and case management. Those proposed amendments are the product of hundreds of written comments from the bench, bar, and public over a three-year period and of public hearings. Yet, as this case illustrates, the enormous effort expended in the rule-making process is all for naught if inherent power is to be a "fall-back" for federal courts unwilling to adhere to the text-based requirements of those rules, amended or not.

This case is the *right* vehicle for this Court to define the interface of inherent power and rule and statutory provisions--the issues being clear, unobstructed and ripe for resolution.

The need for this Court's authoritative voice is highlighted by the Advisory Committee Notes to the proposed amendments, which refer to Chambers v. Nasco, supra, and G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. en banc 1989) (at 58, 71). Those two opinions are so sharply divided on the subject of inherent power that

they cannot serve as guide to the lower courts[10]. Together with the Advisory Committee Notes' citation to Willy v. Coastal Corp., ____ U.S. ____, 112 S.Ct. 1076 (1992), (at 55), those cases only add to litigation-producing confusion.

It is the unrestricted use of inherent power by the Second Circuit, purportedly relying on Chambers, that has generated the alarming precedent which plaintiffs here seek to have reviewed. It is one confirming Justice Kennedy's worst fears, as expressed in his Chambers dissent.

This case also offers a context for this Court to implement the spirit of the "Resolution on Bias in the Federal Judiciary", recently adopted by the Judicial Conference, which recognizes that "bias...presents a danger to the effective administration of justice in the federal courts" Report of the Proceedings of the Judicial Conference of the United States, September 22, 1992. The District Court's hostility to plaintiffs' efforts to obtain critical documents and information, essential to proving their discrimination cause of action, coupled with its failure to follow or even cite this Court's guidepost decision of Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), setting forth the standards of fee awards to defendants in civil rights actions, confirms the need to "sensitize" the federal judiciary as to civil rights. A resounding decision from this Court on that subject can do more, far quicker, than educational programs which do not have the force of "the law of the land".

The civil rights issues in this case are of broad national concern, additionally affecting federal rights under all fee-shifting statutes. The retroactivity issue herein is "the

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[10] The need for greater clarity in the Chambers and Heileman decisions has been the subject of numerous law review articles. As to Chambers, see particularly, Harvard Law Review, Vol. 105 (Nov. 1991), 349-360; Nova Law Review, Vol. 16 (1992), 1527-1566; Tulane Law Review, Vol. 66 (1991), 591-603; also Baylor Law Review, Vol. 43 (1991) at 652-654, 669-670. As to Heileman, see particularly, Indiana Law Journal, Vol. 66 (1991), 977-998; John Marshall Law Review; Vol. 23 (1990), 518-535.

other side of the coin" to cases now on this Court's docket involving the 1991 amendments to the Civil Rights Act. Rivers v. Roadway Express, #92-938; Landgraf v. U.S.I. Film Industries, 92-757; Johnson v. Uncle Ben's, 92-737; Kuhn v. Island Creek Coal Co., 92-787, all pending decision on certiorari applications. This case also is relevant to an issue presented by a case already granted certiorari, Columbia Pictures v. Professional Real Estate Inv., #91-1043, involving attorney fees for alleged sham litigation.

POINT I

The Judicial Remedy Of Fee-Shifting Under Inherent Power Is Barred By Retroactivity And Preemption

The legislative background and the statutory language of civil rights laws, in general, and the Fair Housing Act of 1968, in particular, show that Congress' intent in adopting fee-shifting provisions was to encourage private enforcement in furtherance of our national commitment to a discrimination-free society.

The history of the Fair Housing Amendments Act of 1988 shows that its overriding purpose was to broaden the law and to strengthen its private enforcement[11]. The change in its attorney-fee provision made it uniform with other civil rights laws in effect, which by then had given the term "prevailing party" a settled judicial interpretation, not inconsistent with Congress' purpose. Legislative History of the Fair Housing Amendments Act of 1988, House Report No. 100-711.

That interpretation is found in the seminal case of Christiansburg Garment Co. v. EEOC., supra, which held that

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[11] The amendment not only extended coverage to the handicapped and families with children, but removed the $1,000 cap on punitive damages. 42 U.S.C. §3613(c) (CA-1).

fee-shifting against civil rights plaintiffs could only be sustained when the action was "frivolous, unreasonable, or without foundation", supra, at 421.

Neither the express language of the Fair Housing Amendments Act of 1988, nor its contextual background, supports any view that Congress intended to impose a greater fee liability upon civil rights plaintiffs than existed prior to its enactment. By reason of the settled judicial interpretation of Christiansburg, defining the fee-shifting liability of plaintiffs suing thereunder, the Fair Housing Amendments Act of 1988 should be deemed to have completely and preemptively expressed congressional intent to exclude any award to defendants under inherent power, even were the fee provision to be retroactively applied.

Research has failed to find a single case, before or after 1988, in which a federal court has resorted to inherent power to shift a totality of litigation fees against losing civil rights plaintiffs, where, as here (CA-13), the action was found not to be "meritless" under the standards of Christiansburg.

In Christiansburg, which involved a Title VII "prevailing party" fee provision, this Court intimated the validity of the preemption argument where the statutory fee provision limited the remedy to a "prevailing plaintiff":

> [h]ad Congress provided for attorney's fee awards only to successful plaintiffs, an argument could have been made that the congressional action preempted the common-law rule, and that, therefore, a successful defendant could not recover attorney's fees even against a plaintiff who had proceeded in bad faith. Id., fn. 13.

The case at bar thus presents this Court with the precise situation posited in Christiansburg.

Indications of this Court's view that preemption would preclude an inherent power fee award where a statute is involved may also be gleaned from Fleischmann Distilling

Corp. v. Maier Brewing Co., 386 U.S. 714 (1967)[12]. A dispositive decision by this Court on the preemption "argument" would guide the lower courts on this still-open and recurring issue. Transmission Parts Corp. v. Ajac, 768 F.2d 1001 (9th Cir. 1985)[13].

Relying on Chambers, the Second Circuit has effectively held that the statutory remedy and the Christiansburg standards may be disregarded and circumvented by inherent power. It is for this Court "to make more certain" whether Chambers authorizes such use of inherent power.

Chambers did not involve a fee-shifting statute, such as the 1988 Fair Housing Act. Moreover, in Chambers, the District Court directly used its inherent power to fee-shift, rather than, as here, where the District Court made its primary award under the fee-shifting provisions of the 1988 Fair Housing Act, which it retroactively applied to favor defendants. Indeed, even in devising a fall-back scheme of alternative awards under Rule 11 and §1927, the District Court did not reach out to its inherent power.

The Second Circuit's use of inherent power to accomplish indirectly what the District Court did not do directly marks a dangerous expansion of such power at the expense of civil rights. Draconian penalties, such as visited upon litigants whose case the Circuit Court itself found meritorious (CA-13), will do more than *"chill"* civil rights advocacy, it will *"kill"* it.

The decision herein not only defeats the intent of Congress, as expressed in civil rights laws, and nullifies this

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[12] Fleischmann held that attorneys' fees under a federal statute not providing for a fee award could not be awarded under inherent power because the statutory remedy is intended to circumscribe "the boundaries" of monetary relief in cases arising thereunder.

[13] Transmission rose after the federal statute involved in Fleischmann had been superseded by an attorney fee provision. It reflected, but did not resolve, the preemption issue.

Court's intent in Christiansburg, but constitutes a sub silentio judicial repudiation of the "American Rule" against substantive fee-shifting.

POINT II

The Use Of Inherent Power To Uphold Deficient Fee-Shifting Awards Under Rule 11 and 28 U.S.C. §1927 Violates Standards of Those Provisions, The Rules Enabling Act, And The Constitutional Separation of Powers

The Second Circuit's transformation of the District Court's admittedly uncorrelated $50,000 Rule 11 award and $42,000 §1927 award (CA-52-53) into "free-standing" liabilities, sustainable under inherent power, represents so far a departure from law, logic, and justice as to mandate this Court's "power of supervision".

The intent to accomplish substantive fee-shifting by inherent power is reflected by the Judgment the Second Circuit affirmed (CA-23-24), which provided for awards to the various defendants according to the District Court's Fair Housing Act allocations, rather than the arithmetically diverging allocations under its Rule 11 and §1927 awards (see fn. 7 herein)[14].

The Rule 11 and §1927 awards, although denominated as "sanctions", are in reality the substantive fee-shifting proscribed by those provisions. The Second Circuit's use of inherent power to validate the District Court's circumvention of the plain language of those sanctioning provisions is a violation of the Rules Enabling Act, the constitutional

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[14] Plaintiffs submit that by reason of the discrepant monetary amounts payable to the various defendants under the alternate awards not embodied in the Judgment, the Judgment became void eo instante at the point where the Second Circuit rejected the District Court's award under the Fair Housing Act.

separation of powers, and an open defiance of this Court. Business Guides, supra.

In fashioning an inherent power expedient to salvage the District Court's defective awards under the Fair Housing Act, Rule 11, and §1927, the Second Circuit has nullified the standards and limitations of those provisions, disregarding the case law related thereto of the Second Circuit itself, Oliveri v. Thompson, 803 F.2d 1265 (2nd Cir. 1986) and Browning Debenture Holders' Committee v. Dasa Corp., 560 F.2d 1078 (2nd Cir. 1977). Those bedrock cases lay down stringent standards based on "a high degree of specificity" in factual findings so as to fix personable responsibility for culpable acts. As recognized by Business Guides, supra--decided less than a half year before the District Court's decision--such personal responsibility is "non-delegable"[15].

The District Court's Rule 11 award did not identify a single document--let alone one signed by either plaintiff--that was false or unfounded, factually or legally. It was, therefore, illogical for such an award to be sustained under inherent power which, unlike Rule 11, additionally requires a "bad-faith" predicate.

Similarly, the District Court's §1927 award did not identify any offending conduct by plaintiff Elena Sassower at all. Since the Second Circuit, likewise, did not identify any such conduct--the threshold finding that had to be made--her status as a non-lawyer was irrelevant.

As to Doris Sassower, her status as a lawyer was irrelevant to periods when she was represented by counsel. Yet that, too, was irrelevant, since the District Court had

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[15] The Advisory Committee Notes to the present Rule 11 (97 F.R.D. 199) indicate that the court has "discretion to take account of the special circumstances that often arise in pro se situations. See Haines v. Kerner, 404 U.S. 519 (1972)." The decisions of the District Court or the Circuit Court show that no discretion was exercised in plaintiffs favor by reason of the normal and customary solicitude afforded to pro se litigants. Plaintiffs, in fact, were held to a *higher* standard than their attorneys, who were the signators of the complaint and other documents.

failed to identify any conduct on her part, either when she was pro se or represented by counsel, which "multiplie[d] ... proceedings ... unreasonably and vexatiously". Since, in addition, there were no "costs, expenses, and attorneys' fees" identified by the District Court as relating to such unidentified "proceedings"--let alone any that were "excess" and "reasonably incurred", the award under §1927, which the Second Circuit approved against Doris Sassower, fell abysmally short of the clear standards of that statutory provision as well.

The Second Circuit dispensed even with the standards of fee-shifting under inherent power, predicated on findings of "necessity" and "bad-faith".

The fact that the Second Circuit's only citation for its use of inherent power is Chambers realizes the forebodings of Justice Kennedy's dissent that inherent power would be more than interstitial and would, in the absence of definitional limits, supplant perfectly adequate rule and statutory provisions.

The fundamental question as to the interface of inherent power with rules and statutes was not resolved in Chambers, which further did not address the issue squarely raised in this case as to whether inherent power can be used as a "fall-back" by a Circuit Court or District Court. That issue was explicitly left open in this Court's recent decision in Willy v. Coastal Corp., ____ U.S.____, 112 S.Ct. 1076, at fn. 5 (1992).

POINT III

Inherent Power, As Applied By The Second Circuit, Volates Fundamental Constitutional Rights, And Decisional Law Of This Court

A. *The Fifth Amendment: Due Process*

The Second Circuit, purporting to rely on Chambers, disregards its underlying due process premise: "A

Court...must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees" Id., at 2136.

The Chambers majority twice approved the lower court's specific finding that "the requirements of due process have been amply met...", Id., at 2130, 2139, citing Nasco, Inc. v. Calcasieu Television and Radio, 124 F.R.D. 120, at 141, fn. 11.

The elements of due process afforded to Chambers included: (a) notice that an award under inherent power was being sought by the adverse party; (b) a hearing; and (c) detailed factual findings.

In this case, *none* of those basic due process prerequisites exist. Nor was there any finding by either the District Court or the Second Circuit that they had been. This is particularly significant since plaintiffs repeatedly raised the issue that their due process rights had been violated, unlike the situation in Chambers, where the lower court expressly found that "due process has never been an issue" (Id., at fn. 11).

It is a principle long recognized that "A fair trial in a fair tribunal is a basic requirement of due process". In Re Murchison, 349 U.S. 133, 136 (1955), cited in Holt v. Virginia, 381 U.S. 131, 136 (1965), Withrow v. Larkin, 421 U.S. 35 (1935). By admission of the District Court, plaintiffs' "bias recusal motions" formed a basis for its fee award (CA-37). Yet, there was no finding by either the District Court or the Second Circuit that such motions were false, unfounded, or made in bad faith. As this Court made clear in Holt, supra, at 136, the right "to escape a biased tribunal" is itself a due process right, which may not be penalized under inherent power by a fine in reprisal for making a recusal motion grounded on judicial bias.

The result of this wholesale denial of due process is a judgment "so totally devoid of evidentiary support as to render [it] unconstitutional under the Due Process Clause...". Cf., Garner v. State of Louisiana, supra, 368 U.S. 157, 163 (1961); Thompson v. City of Louisville, 362 U.S. 199 (1960).

The factual record shows *no* sanctionable conduct by plaintiffs which could support an award of punitive sanctions against them. Nor was there any.

The due process requirements, seemingly clear in Chambers, are muddied by its reliance on Link v. Wabash Railroad Company, 370 U.S. 626 (1962), a case this Court also cited in Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). Chambers, supra, at 2133, like Roadway, supra, at 765, cited Link for the proposition that fee-shifting under a court's inherent power is permissible as a "*less* severe" sanction than dismissal of a complaint, authorized by the four judge majority in Link. However, a focal issue in Link was denial of due process, which the three Link dissenters found to have been violated. Thus, there is a serious inconsistency between Chambers and Roadway on one hand, which require due process for the "*less* severe" sanction of fee-shifting, and Link, which dispenses with the requirement of due process for the *more* severe sanction of dismissal of a complaint. Such irreconcilable decisions have fostered confusion in the Second Circuit as to the due process standards applicable to inherent sanctioning power--and necessitates clarification by this Court.

Plenary review by this Court is thus essential to clarify the due process concomitants of inherent sanctioning power as to which Link, Roadway Express, and Chambers are in direct, apparent, and intolerable conflict.

B. The Seventh Amendment: Trial By Jury

The precise question of whether a fee-shifting award may be made under the Fair Housing Act against unsuccessful civil rights plaintiffs without affording them the right to a jury trial on the issues of their liability and amount has not been decided by this Court.

The District Court denied such right when it awarded a substantial monetary amount under the Fair Housing Act, viewing this Court's decisions in Tull v. United States, 481 U.S. 412 (1987) and Lytle v. Household Manufacturing, Inc.,

494 U.S. 545 (1991) as contrary, if not irrelevant, to the right asserted by plaintiffs (CA-31).

Nearly twenty years ago, in Curtis v. Loether, 415 U.S. 189, 193 (1974), this Court recognized the Seventh Amendment right to jury trial in actions for damages under the Fair Housing Act, analogizing such statutorily-created causes of action to "suits at common law". See also, Legislative History of the Fair Housing Amendments Act, H.R. 1158; House Report No. 100-711.

In both Tull, which relied on Curtis, and in Lytle, this Court reaffirmed the right to jury trial in cases arising under other fee-shifting statutes. In creating a cause of action for attorneys' fees under fee-shifting statutes, such common-law legal remedy based on traditional criteria as to "reasonable value" of legal services, should likewise trigger Seventh Amendment legal rights. This is particularly true, where, as here, the issues of liability and amount of any fee award are vigorously contested, and where the outcome of the fee issues inevitably impact on future civil rights actions.

POINT IV

The Circuit Court's Use Of Equitable Inherent Power Is Unrestrained By Equitable Considerations Of "Unclean Hands" And "Unjust Enrichment"

It is a time-honored principle that "he who comes into equity must come with clean hands". Keystone Driller Co. v. General Excavator Co, 290 U.S. 240, 245 (1933).

> "The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity" Id., 247, citing Bein v. Heath, 6 How. 228.

Yet, the Court of Appeals disregarded the *adjudicated* discovery misconduct on the part of one of the defendants and his counsel (A-241-266), which was of a nature sufficient to have precluded *any* fee award to that insured defendant, and disregarded the *uncontroverted* proofs in plaintiffs' Rule 60(b)(3) motion showing the complicity of the other defendants and their counsel prima facie, if not conclusively, in such misconduct, as well as other discovery misconduct of their own (Br. 31-33).

Moreover, since the insured defendants paid no defense costs, it was their burden to show facts establishing that the fees sought would not be a *"windfall"*, precluded under controlling law. Nonetheless, the defendants not only failed to provide *any* documentation to meet their burden[16], they did *not* even claim an intention, let alone an obligation, to make the insurer the ultimate beneficiary of the fee award.

The identity of the ultimate recipients of the fee award--and their equitable entitlement thereto--should have been, but was not, a threshold issue for adjudication by the

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[16] That burden, inter alia, also required defense counsel for the Co-Op to document his claim that he was entitled to be paid an hourly rate of *150% more* than the hourly rate paid by the insurer (AA-17). The district court accepted his claim to an increased entitlement, relying on its citation to a "contingent retainer" case (CA-30-31, 50-51)--even though defense counsel never claimed to have had a "contingent retainer". Moreover, in affirming the Judgment (CA-23-24), the Circuit Court disregarded City of Burlington v. Dague, ____ U.S. ____, 112 S.Ct. 2638 (1992), rendered a month and a half earlier and reiterating that fee awards are governed by the "lodestar" approach to achieve a "reasonable" fee, not the contingent retainer model. No "lodestar" was employed by the District Court.

The Circuit Court also disregarded its own controlling case of New York Association for Retarded Children v. Carey, 711 F.2d 1136, 1147 (1983) (Newman, J.), holding that "contemporaneous time records are a prerequisite for attorney's fees in this Circuit". Notwithstanding that the District Court explicitly referred to plaintiffs' objection on this ground in its Opinion (CA-51), it failed to make a finding on that subject, as did the Circuit Court, whose Opinion in the case at bar was by the same "Newman, J", as authored Carey.

Second Circuit[17].

POINT V

The Second Circuit's Discriminatory Use of Inherent Power Raises Serious And Substantial Questions As To Denial Of Equal Protection Of Law

The Second Circuit's decision highlights the invidiousness of inherent power: invoked, sua sponte, against civil rights plaintiffs to sustain fee-shifting sanctions, *without* any finding or even claim of fraud on their part, but not invoked in their favor where plaintiffs specifically moved under inherent power, as well as under Rule 60(b)(3), against defendants, whose fraudulent statements and conduct were established by plaintiffs' *uncontroverted, unrebutted supporting documentary proof*.

Fraud upon a court has been the traditional basis for invocation of inherent power--a historic origin recalled in Chambers:

> ...'tampering with the administration of justice in [this] manner...involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and

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[17] Likewise an issue for equitable adjudication was the financial ability of plaintiff Doris Sassower, upon whom the Circuit Court placed the entire liability. Particularly since the Circuit Court noted that Doris Sassower's "current status [as a member of the bar] is in some doubt" (CA-8), it had a basis upon which to question whether that fact might have some impact upon her financial ability to pay a $93,350 Judgment, plus, by reason of its affirmance thereof, the insured defendants' costs on plaintiffs' appeal. Rather than speculating as to Doris Sassower's financial resources, the Second Circuit should have applied its own cited case of Faraci v. Hickey-Freeman Co., 607 F.2d 1025, 1029 (2d Cir. 1979) (CA-17-18) equally to both plaintiffs

> safeguard the public'. [Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)], at 246...a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud. [Universal Oil Products Co. v. Root Refining Co.], 382 U.S. [575 (1946)], at 580.... Chambers, at 2132

The District Court was presented with *unrefuted* documentary evidence supporting plaintiffs' two separate fraud claims involving "fraud, misrepresentation, [and]...misconduct" by defendants and their counsel: one in connection with the pre-trial discovery process; the other, the filing of false and unfounded fee applications by insured defendants, knowingly seeking a *"windfall"*.

Apart from their formal Rule 60(b)(3) motion, plaintiffs specifically invoked the District Court's inherent power to reach these two fraud issues. The lack of *any* counter-proof to plaintiffs' specific factual allegations and documentary evidence made the "power" to adjudicate such fraud issues a "duty", Hazel-Atlas, supra, at 249-50, which the lower courts were not free to shirk.

The insured defendants *never* disputed that they were not "the real parties in interest"--either before the District Court or the Circuit Court. Nor did they assert *any* contractual duty or intention to reimburse their insurer. The Second Circuit's summary denial of plaintiffs' motion to vacate the Judgment disregarded the clear commands of Rules 17(a) and 19, and was in direct conflict with this Court's decision in United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949), as well as its own decision in Brocklesby Transport v. Eastern States Escort, 904 F.2d 131, 133 (2d Cir. 1990).

Likewise, since defendants did *not* deny--either before the District Court or the Circuit Court--*their deliberate suppression and destruction of crucial discovery materials and the substantial interference and prejudice to plaintiffs'*

case caused thereby, the Second Circuit had no legal or factual basis for affirming the District Court's summary denial of plaintiffs' *uncontroverted* Rule 60(b)(3) motion, which should have been granted as a matter of law. Anderson v. Cryovac, Inc., 862 F.2d 910, at 926 (1st Cir. 1988), Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978).

By the Second Circuit's use of equitable inherent power to grant relief it should have denied and to deny relief it should have granted, this case brings into sharp focus the extent to which inherent power can be misdirected from its original purpose. That purpose was to protect the integrity of the judicial process, not to serve as a cloak for discriminatory adjudications.

EPILOGUE

"Extraordinary" departures from fundamental law are manifest from the face of the District Court and Circuit Court's Opinions. Decisions which fail to provide "valid reasons" for invoking inherent power, where standards of applicable statute and rule provisions have not been met, should be "presumptively suspect". When inherent power is used to deny equal protection of laws, rather than to enforce them, it is a time for the Supreme Court to intervene and, in no uncertain terms, exert its "power of supervision".

CONCLUSION

Plaintiffs respectfully pray that their Petition for Certiorari be granted; that the decision of the Second Circuit be summarily reversed and the Judgment thereon vacated; and that plaintiffs' Rule 60(b)(3) motion for a new trial and sanctions be granted, as a matter of law.

Respectfully submitted,

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February 22, 1993

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

FAIR HOUSING ACT OF 1968

42 U.S.C. §3612 Enforcement by private persons

(c) Injunctive relief and damages; limitation; court costs; attorney fees. The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

FAIR HOUSING AMENDMENTS ACT OF 1988

42 U.S.C. §3613 Enforcement by private persons

(c) Relief which may be granted. (1) In a civil action under subsection (a) [Enforcement by Private Persons], if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to section (d), may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate). (2) In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

RULE 60

Relief From Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.
On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ...(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; ...or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding...or to set aside a judgment for fraud upon the court...

RULE 11

Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the

extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

28 U.S.C. §1927

Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

RULE 17

Parties Plaintiff and Defendant; Capacity

(a) Real Party In Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a

reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

RULE 19

Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the

person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

28 U.S.C. §2072

Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure...for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

FIFTH AMENDMENT TO THE U.S. CONSTITUTION

...nor shall any person...be deprived of life, liberty, or property, without due process of law...

SEVENTH AMENDMENT TO THE U.S. CONSTITUTION

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried to jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

CA-6

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 954—August Term 1991

Argued: February 28, 1992 Decided: August 13, 1992

Docket No. 91-7891

ELENA RUTH SASSOWER, DORIS L. SASSOWER,

Plaintiffs-Appellants,

—v.—

KATHERINE M. FIELD, CURT HAEDKE, LILLY HOBBY, WILLIAM IOLONARDI, JOANNE IOLONARDI, ROBERT RIFKIN, individually, and as Members of the Board of Directors of 16 Lake Street Owners, Inc., HALE APARTMENTS, DESISTO MANAGEMENT INC., 16 LAKE STREET OWNERS, INC., ROGER ESPOSITO, individually, and as an officer of 16 Lake Street Owners, Inc.,

Defendants-Appellees.

Before:

LUMBARD, NEWMAN and WINTER,

Circuit Judges.

Appeal from a supplemental judgment of the District Court for the Southern District of New York (Gerard L.

Goettel, Judge) requiring *pro se* plaintiffs to pay defendants' attorney's fees and expenses of $93,350 as a sanction for the vexatious conduct of unsuccessful litigation claiming housing discrimination.

Affirmed as to liability, affirmed as to amount with respect to Doris Sassower, and vacated and remanded as to amount with respect to Elena Sassower.

ELENA RUTH SASSOWER, plaintiff-appellant *pro se*, White Plains, N.Y.

DORIS L. SASSOWER, plaintiff-appellant *pro se*, White Plains, N.Y.

DENNIS T. BERNSTEIN, Tuckahow, N.Y., for defendant-appellee Hale Apartments.

LAWRENCE J. GLYNN, White Plains, N.Y., for defendants-appellees Field, Haedke, Hobby, William Iolonardi, Joanne Iolonardi, Rifkin, & 16 Lake St. Owners, Inc.

STEVEN L. SONKIN, New York, N.Y. (Marshall, Conway & Wright, New York, N.Y., on the brief), for defendants-appellees DeSisto Management, Inc. & Esposito.

(Julius L. Chambers & Charles Stephen Ralston, New York, N.Y., submitted an *amicus curiae* brief for NAACP Legal Defense & Educational Fund, Inc.)

JON O. NEWMAN, *Circuit Judge*:

This appeal from a supplemental judgment imposing sanctions upon two unsuccessful plaintiffs for the vexatious conduct of litigation involves the extraordinary remedy of an award of nearly $100,000 assessed against *pro se* litigants, occasioned by extraordinary conduct. The judgment was entered by the District Court for the Southern District of New York (Gerard L. Goettel, Judge), requiring Doris L. Sassower and her daughter, Elena Ruth Sassower, to pay defendants' attorney's fees and expenses of $93,350 at the conclusion of their unsuccessful suit claiming housing discrimination. We conclude that Judge Goettel was abundantly justified in imposing sanctions against both plaintiffs and that the amount imposed upon Doris Sassower was fairly determined, but that the amount of the sanction imposed on Elena Sassower must be reconsidered in light of her limited financial resources.

Facts

Doris and Elena Sassower filed their suit *pro se* in 1988, alleging violation of the Federal Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1988), and other federal and state law claims. At various stages of the litigation, they were represented by counsel. Doris Sassower was then a member of the bar, although her current status is in some doubt. *See Attorney Sanctioned by Court of Appeals*, N.Y.L.J. (Sept. 11, 1991). Defendants include the corporate owner of a cooperative apartment building in White Plains, New York, and directors and an officer of the corporate owner. The plaintiffs alleged that the defendants had discriminated against them by rejecting their application to acquire an apartment in the building through purchase of coop stock shares and assignment of a pro-

prietary lease from a former occupant. Plaintiffs alleged discrimination on account of their status as single, Jewish women. Defendants contended that the rejection had nothing to do with the status of the plaintiffs, but was based primarily on the owner's disapproval of the use to be made of the apartment. While approval was being sought, the apartment was occupied by George Sassower, the former husband of Doris and the father of Elena.[1] Evidence at trial indicated that he was arrested at the apartment for what the District Court understood was the illegal practice of law. Evidence also indicated that the occupants of the apartment building included Jews and single women, a circumstance tending to refute plaintiffs' claim concerning the basis for their rejection.

After some of the defendants were dismissed on motion for summary judgment, *see Sassower v. Field*, 752 F. Supp. 1182 (S.D.N.Y. 1990); *Sassower v. Field*, 752 F. Supp. 1190 (S.D.N.Y. 1990), the case was tried before a jury for seven days. The jury answered specific interrogatories, rejecting all of plaintiffs' claims, including the claim that the religion, gender, or marital status of the plaintiffs was a reason for the rejection of their application to purchase the apartment.

After entry of judgment for the defendants, the District Court granted the defendants' request for counsel fees and costs as prevailing parties pursuant to the Fair Housing Act, 42 U.S.C. § 3613(c)(2) (1988). In the alternative the Court imposed sanctions against the plaintiffs pursuant to Fed. R. Civ. P. 11, 28 U.S.C. § 1927 (1988), and the Court's inherent power "because of their tactics of delay, oppression and harassment." District Court opinion of August 12, 1991 (hereafter "Opinion"), at 18. Judge Goet-

1 George Sassower is a disbarred attorney whose proclivity for frivolous and vexatious litigation has repeatedly resulted in sanctions.

tel carefully reviewed the extraordinary pattern of vexatious litigating tactics engaged in by the plaintiffs during the pendency of the litigation and concluded that they had acted "in bad faith, vexatiously and unreasonably." *Id.* at 14 (footnotes omitted). As he stated, "The Sassowers pursued this litigation as if it was a holy war and not a court proceeding, managing these proceedings in a fashion that vexatiously, wantonly and for oppressive reasons increased the legal fees enormously." *Id.* at 13.

As summarized by the District Court, the plaintiffs' conduct included the following:

> They made several unsupported bias recusal motions based upon this court's unwilling involvement in some of the earlier proceedings initiated by George Sassower. . . . There were continual personal attacks on the opposing parties and counsel. . . . In virtually every instance where a court ruling was not satisfactory to them, plaintiffs routinely made a motion to reargue. In addition, plaintiffs filed two improper interlocutory appeals which were subsequently withdrawn. . . . Finally, they have now filed a mammoth motion for a new trial and sanctions against opposing counsel which seeks to reargue virtually every aspect of the litigation for the third time.

Opinion at 13-14 (citations and footnotes omitted). The District Judge also noted that the plaintiffs "attempted to communicate directly with the defendants rather than through counsel in order to force through their settlement demands." *Id.* at 14 n.10. Previously the Magistrate Judge supervising discovery had recommended dismissal of the complaint because of Doris Sassower's egregious failure to make discovery as directed by the Court. The District Judge, though noting misbehavior warranting sanctions,

declined to dismiss because the complaint would still be pursued by Elena. He nonetheless observed:

> It is patently clear that Doris L. Sassower has been guilty of attempting to manipulate the court by appearing as attorney on those matters which could assist her case while refusing to be deposed herself, claiming health problems. We were compelled at an earlier time to allow [her] to appear *pro se* and to relieve her attorney because of the law of this Circuit, even though we could foresee the type of manipulation that has frequently occurred.

Id. at 16. The Court also noted her recalcitrance at her own deposition and her role assisting another attorney "in conducting incredibly harassing depositions of certain of the defendants." *Id.* at 17. Some of that questioning included what the Court termed "particularly shocking and abusive" questioning of a Black member of the coop's board of directors, questioning laced with racial innuendo. *Id.* at 22.[2] Repeatedly throughout the litigation, the District Judge cautioned the plaintiffs that their vexatious and harassing conduct, if continued, was likely to incur monetary sanctions at the conclusion of the case.

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2 Judge Goettel noted that Doris Sassower's vexatious tactics had been observed by other courts. He quoted the following comments of Justice Samuel G. Fredman of the New York Supreme Court, County of Westchester:

> From the relatively simple molehill of potential issues which could possibly arise from such conduct, Sassower has created a mountain of legal, factual and even political abracadabra. Her actions have taken an inordinate amount of this Court's time and tested its patience beyond the wildest imagination. . . . [M]onths of actual court time [were] spent in permitting Sassower to preserve her rights by trick and chacanery beyond the concept of most any lawyer who practices in our courts. She is indeed sui generis in her actions . . . .

Id. at 14-15 n.11 (quoting *Breslaw v. Breslaw*, Slip Op., Index No. 22587/86 at 2, 12 (June 24, 1991)).

The District Judge awarded to the defendants a total of $92,000 in fees and $1,350 in expenses, and imposed liability for these amounts jointly upon Doris and Elena Sassower. Plaintiffs appeal from the award of attorney's fees and from the denial of their motion for a new trial and their request to have sanctions imposed on the defendants.

Discussion

I. Attorney's Fees

A. *Fair Housing Act.* At the time the complaint in this case was filed, the Fair Housing Act authorized an award of attorney's fees only to a prevailing *plaintiff*. 42 U.S.C. § 3612(c) (1982). The current version, enacted in 1988, Pub. L. No. 100-430, § 8(2), 102 Stat. 1633 (1988), authorizes fees for a prevailing *party*. 42 U.S.C. § 3613(c)(2) (1988). The District Court, noting that the plaintiffs had amended their complaint twice after the effective date of the new fee-shifting provision, awarded fees incurred by the defendants after the effective date. Judge Goettel determined these fees to total $92,000, plus $1,350 of expenses. The rationale for awarding defendants their attorney's fees to this extent was not simply that the defendants were "prevailing part[ies]" but that the lawsuit was "totally meritless." Opinion at 7.

Even if we assume for the argument that the amended fee-shifting provision could be applied to a lawsuit filed before its effective date, to the extent of shifting fees incurred after its effective date, we cannot agree that fees could be awarded under the Fair Housing Act. That statute, like other civil rights fee provisions, permits an award of fees to prevailing defendants only upon a showing that the suit is "frivolous, unreasonable, or without

foundation." *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). As the District Judge recognized, the plaintiffs' suit adequately alleged the elements of a *prima facie* case of discrimination and presented a factual dispute for the jury as to whether the plaintiffs had proven that the defendants' articulation of non-discriminatory reasons for their actions was pretextual. *See Sassower v. Field*, 752 F. at 1189-90.

It is arguable that even a civil rights plaintiff must bear the risk of an award of defendant's attorney's fees when a jury resolves factual disputes in favor of a defendant and a judge concludes that the claim, though requiring jury consideration, was entirely insubstantial. We have upheld fee-shifting after a civil rights bench trial where the plaintiff's testimony was found to have been "an unmitigated tissue of lies." *See Carrion v. Yeshiva University*, 535 F.2d 722, 728 (2d Cir. 1976). In the pending case, however, the essential issue was not whether the plaintiffs were credible in their account of the factual circumstances; it was whether the defendants' explanations for their actions were legitimate or pretextual. There is no finding that the plaintiffs did not believe that they had been the victims of discrimination. Moreover, though there were various disputes as to some details of the dealings between the plaintiffs and the defendants, there was no finding that the plaintiffs' had given a false account of the basic facts alleged to support an inference of discriminatory motive. Nor is this a case where the trial judge expressed the view that no reasonable jury could have found in plaintiff's favor but reserved ruling on a motion for a directed verdict and submitted the case to the jury simply to have a verdict in the event that a court of appeals might have disagreed with his subsequent ruling to set aside a plaintiffs' verdict, had one been returned. In

these circumstances, to award defendants their attorney's fees simply because the jury found in their favor and the trial judge found the verdict overwhelmingly supportable risks imposing too great a chilling effect upon the prosecution of legitimate civil rights lawsuits. We cannot sustain the fee award under the Fair Housing Act.

Though the outcome of the lawsuit adverse to the plaintiffs is an insufficient basis to require them to pay defendants' attorney's fees under the Fair Housing Act, substantial issues remain as to whether the plaintiffs are liable for such fees for the manner in which they conducted the litigation.

B. *Rule 11.* Recognizing the possibility that the fee award might not be sustainable under the Fair Housing Act, Judge Goettel grounded portions of the award alternatively upon Fed. R. Civ. P. 11, the Court's inherent authority, and 28 U.S.C. § 1927. Rule 11 applies, as the District Court recognized, to those who sign a "pleading, motion, and other paper" without making "reasonable inquiry [that] it is well grounded in fact." Fed. R. Civ. P. 11. Judge Goettel assessed $50,000 as a Rule 11 sanction. However, he did not specify the documents the signing of which violated the Rule. He probably had in mind principally the complaint, though he also noted that "[d]uring the course of this lengthy proceeding, both of [the plaintiffs] signed numerous documents." Opinion at 11. Since we conclude below that the $50,000 portion of the award grounded on Rule 11 is equally supportable by the exercise of the District Court's inherent authority, we need not return the matter to Judge Goettel for a precise identification of which documents warranted Rule 11 sanctions.

C. *28 U.S.C. § 1927.* As a further alternative to a fee award under the Fair Housing Act, Judge Goettel

grounded a portion of the fee award, $42,000, on 28 U.S.C. § 1927, which permits imposition of fees upon "[a]ny attorney or other person admitted to conduct cases in any court of the United States" who "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927 (1988). This $42,000 is in addition to the $50,000 awarded under Rule 11. Unquestionably, the conduct of the plaintiffs warranted an award under section 1927. The issue posed by this portion of the award is whether section 1927 sanctions may be imposed on *pro se* litigants, or at least on a *pro se* litigant who was a lawyer at the time of the litigation.

Judge Goettel ruled that section 1927 may be applied to *pro se* litigants, including non-lawyers. The Ninth Circuit has adopted this position. *See Wages v. I.R.S.*, 915 F.2d 1230, 1235-36 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 986 (1991). We disagree. Section 1927 applies to any "attorney or other person admitted to conduct cases" in a federal court. Judge Goettel considered the *pro se* plaintiffs to be "person[s] admitted to conduct cases" because they had been granted permission to proceed *pro se*. Opinion at 17. But the word "admitted" in this context suggests application to those who, like attorneys, gain approval to appear in a lawyerlike capacity. Moreover, parties generally have a right to appear *pro se*. *See* 28 U.S.C. § 1654 (1988); *O'Reilly v. New York Times Co.*, 692 F.2d 863, 867 (2d Cir. 1982). Though the Sassowers' former attorney needed and obtained permission to be relieved, the granting of his motion left the plaintiffs free to proceed *pro se*, without further order of the Court.

Moreover, it is unlikely that Congress intended the phrase "other person" to include a person lacking lawyer-like credentials. The prior version of the statute read "any attorney, proctor, or other person admitted." *See Motion*

Picture Patents Co. v. Steiner, 201 F. 63, 64 (2d Cir. 1912). This phrasing also suggests that "other person" covers those admitted to act in a lawyerlike capacity. We also note that the Supreme Court recently recounted, without disagreement, a District Court's assertion that section 1927 "applies only to attorneys." *See Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2131 (1991). This reference implies approval of the District Court's view, since there would have been no need for the Supreme Court to consider the larger question of the trial judge's inherent authority to sanction if section 1927 had applied to the non-lawyer.

Though section 1927 will not support sanctions against Elena Sassower, it is available for use against Doris Sassower, who, though acting *pro se*, was a lawyer, at least at the time of this litigation. Since section 1927 is designed to curb abusive tactics by lawyers, it should apply to Atty. Sassower notwithstanding the fact that her only client in this matter was herself.

As an alternative to reliance on section 1927, Judge Goettel grounded the $42,000 portion of the sanctions on the Court's inherent authority, as he had done, alternatively, with the $50,000 portion based on Rule 11. We turn then to that basis of authority.

D. *Inherent Authority*. Judge Goettel explicitly relied, alternatively, on his inherent authority in the portion of his Opinion awarding Rule 11 sanctions, *see* Opinion at 11, and in the portion awarding section 1927 sanctions, Opinion at 18. We may reasonably infer that he intended to base the $50,000 portion of the award, alternatively, on his inherent authority, to whatever extent it was not supportable by Rule 11, and to base the $42,000 portion of the award, alternatively on his inherent authority, in the

event section 1927 was deemed inapplicable to Elena Sassower.

The Supreme Court has made clear that a district court has inherent authority to sanction parties appearing before it for acting in bad faith, vexatiously, wantonly, or for oppressive reasons. *See Chambers v. NASCO, Inc.*, 111 S. Ct. at 2133. Having reviewed the course of the litigation and the numerous instances of entirely vexatious and oppressive tactics engaged in by the plaintiffs, we agree with Judge Goettel that his inherent authority was properly used to sustain these portions of the award.

E. *Amount of Sanctions*. We have ruled that when a court awards defendant's attorney's fees, it must take into account the financial circumstances of the plaintiff. *See Faraci v. Hickey-Freeman Co.*, 607 F.2d 1025, 1029 (2d Cir. 1979). No concern need be raised with respect to Doris Sassower. Judge Goettel explicitly relied on trial testimony that revealed that she was living in "a two million dollar mansion." Opinion at 10 n.6. Though the value of an expensive home does not necessarily demonstrate ability to pay $93,350 in sanctions, Doris Sassower has made no claim on appeal that the sanction is beyond her means. With respect to Elena Sassower, however, Judge Goettel explicitly stated that he did "not believe that she is financially able to respond in the payment of attorneys' fees and sanctions." Opinion at 19 (footnote omitted). He noted that she had claimed during the trial to be indigent. Nevertheless he imposed liability for the fees jointly upon Elena and her mother, though expressing his expectation that "these costs will probably have to be borne solely by" the mother. Opinion at 19.

Though we conclude that the Judge was entitled to find both mother and daughter liable for sanctions, we must

vacate the imposition of joint liability for the full amount upon Elena, in the absence of evidence that her financial resources permit an award of that size. Upon remand, the District Court may assess against her such portion of the award as is appropriate in light of her resources.

Though the amount of the sanction that we fully uphold with respect to Doris Sassower is large, it is in fact only a portion of the fees expended by defendants that could have been assessed in view of the plaintiffs' conduct. Judge Goettel chose to award only those fees incurred after the effective date of the amended fee provision of the Fair Housing Act. Since the fee award is being sustained on the basis of authority other than the Act, the selection of this date as a starting point for fees operates as a fortuitous benefit for the plaintiffs.

II. New Trial

Continuing their vexatious and harassing tactics, the plaintiffs submitted to Judge Goettel, several months after the trial, a motion for a new trial under Rule 60(b)(3). The motion was accompanied by several hundred pages of supporting papers and a thousand pages of exhibits. In the main, the motion is nothing more than a reargument of numerous claims made prior to and during the trial, including factual issues resolved against the plaintiffs by the jury. Judge Goettel acted well within his discretion in denying the motion.

We have considered all of the other issues raised by appellants and find them totally lacking in merit.

Conclusion

The denial of plaintiffs' motion for new trial and for sanctions against the defendants is affirmed; the supplement judgment awarding sanctions against the plaintiffs is affirmed as to liability, affirmed as to amount with respect to Doris Sassower and vacated and remanded as to amount with respect to Elena Sassower.

CA-20

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of August, one thousand nine hundred and ninety-two.

[Stamped] FILED: AUG. 13, 1992

Present: HON. J. EDWARD LUMBARD,
HON. JON O. NEWMAN,
HON. RALPH K. WINTER,
Circuit Judges.

ELENA RUTH SASSOWER, et. ano.,
Plaintiffs-Appellants,

-v- Docket #: 91-7891

KATHERINE M. FIELD, et. al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the appeal from a supplemental judgment of said district court be and it hereby is affirmed as to liability, affirmed as to amount with respect to Doris Sassower and remanded as to amount with respect to Elena Sassower in accordance with the opinion of this court.

ELAINE GOLDSMITH, Clerk
By: Arthur Heller, Deputy Clerk

[stamped] A TRUE COPY,
ELAINE B. GOLDSMITH, Clerk
By: Carolyn Clark Campie

ISSUED AS MANDATE
10/6/92

T 1080
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SASSOWER,

Appellants,

Docket #: 91-7891

-v- NOTICE OF MOTION
for procedural and substantive relief

FIELD,

Appellees.

[Stamped] FILED NOV 29, 1991

... Vacate Judgment for counsel fee/sanctions for lack of subject matter jurisdiction

[signed] Elena Ruth Sassower Pro Se 11/26/91
Doris L. Sassower Pro Se 11/26/91

It IS HEREBY ORDERED that...

... motion to vacate judgment of counsel fees is referred to the panel that will hear the appeal.

Date: DEC 04 1991 [signed] Frank X. Altimari
Circuit Judge

[Stamped] FILED AUG. 13, 1992

BEFORE: Hon. J. Edward Lumbard, Hon. Jon O. Newman, Hon. Ralph K. Winter, Circuit Judges

IT IS HEREBY ORDERED that the motion to vacate judgment of counsel fees be and hereby is DENIED

FOR THE COURT
By: Chandella Gaillard, Deputy Clerk Dated: 8/13/92

[stamped] FILED: AUG 13 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELENA RUTH SASSOWER, et. ano.,

Plaintiffs,

88 Civil 5775 (GLG)

-against-

JUDGMENT

KATHERINE M. FIELD, et al.,

Defendants.

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Whereas the above entitled action have been assigned to the Honorable Gerard L. Goettel, U.S.D.J., and the Court thereafter on August 12, 1991, having handed down its opinion, denying Plaintiff's motion in all respects and granting attorney's fees to the defendants to be paid by the above named plaintiffs it is,

ORDERED, ADJUDGED AND DECREED: That the defendants Katherine M. Field, Curt Haedke, Lilly Hobby, William Iolonardi, Joanne Iolonardi, Robert Rifkin, Individually and as members of the Board of Directors of 16 Lake Street Owners, Inc. and 16 Lake Street Owners, Inc. recover from plaintiffs the sum of $50,000.00 in fees and $850.00 in expenses for a total of $50,850.00.

ORDERED, ADJUDGED AND DECREED: That the defendant Hale Apartments recover from plaintiffs the sum of $12,000.00 in fees and $500.00 is disbursements for a total of $12,500.00.

ORDERED, ADJUDGED AND DECREED: That the defendant Roger Esposito recover from plaintiffs the sum of $18,000.00 in fees and expenses.

ORDERED, ADJUDGED AND DECREED: That the Defendant DeSisto Management recover from plaintiffs the sum of $12,000.00 in fees and expenses.

ORDERED, ADJUDGED AND DECREED: That Eli Vigliano is directed to pay $1,000.00 to Daisy Hobby and $500.00 to Curt Haedke.

ORDERED, ADJUDGED AND DECREED: That sanctions are assessed as to John McFadden and his counsel, James Glatthaar jointly and severally, in the amount of $3,000.00 to be paid to DeSisto Management and $3,000.00 to be paid to Roger Esposito.

Dated: White Plains, New York
August 13, 1991

[signed] James M. Parkison
Clerk

CA-25

[Stamped] FILED SEP 25, 1992

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of September on thousand nine hundred and ninety-two.

ELENA RUTH SASSOWER, et. ano.,

Plaintiffs-Appellants,

- v-

Docket #: 91-7891

KATHERINE M. FIELD, et. al.,

Defendant-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiffs-appellants, Elena Ruth Sassower and Doris L. Sassower.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH, Clerk
by: s/Carolyn Clark Campbell, Chief Deputy Clerk

T 1080
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELENA RUTH SASSOWER, et. ano.,

Appellants,

-v- Docket #: 91-7891

KATHERINE M. FIELD, et. al.,

NOTICE OF MOTION
for Procedural Relief

Appellees.

[Stamped] FILED: SEP 24, 1992

Brief Statement of the relief requested:

Motion to:

(a) supplement appellate record on the rehearing application now pending before this Court

(b) obtain leave, if necessary, to cross-move in the District Court under Rule 60(b)

[signed] Elena Ruth Sassower Pro Se September 23, 1992
Doris L. Sassower Pro Se

[Stamped] FILED: OCT. 1, 1992

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

[signed] J. Edw. Lumbard (per J.O.N)
Jon O. Newman
Ralph K. Winter (per J.O.N.)

Date: OCT 01 1992

REPRINTED FROM THE SEPTEMBER 5, 1990 OPINION OF THE DISTRICT COURT DENYING SUMMARY JUDGMENT TO THE DEFENDANT CO-OP
(Plaintiffs' Appellate Appendix: A-155-156)
(See, also, 752 F. Supp. 1182, at 1189)

* * *

Second, the plaintiffs argue that the defendants failed to comply with their own internal guidelines. Specifically, the plaintiffs point to a document entitled "Cooperative Guidelines for Admission."[1] This document, which lays

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[1] The precatory paragraph of this document reads as follows:

> "The Board of Directors in approving or disapproving co-op apartment transfers must comply with both constitutional and statutory discrimination prohibitions. Confronted with this dilemma and particularly when considering either an application involving minorities or single women, when a co-op board decides to reject a purchaser, it may become incumbent upon the co-op, through either its managing agent or counsel, to articulate its valid reasons for *rejection. This should be done contemporaneously with the making of* the decision to reject in order to refute a subsequent claim by the rejected applicant or the seller of the apartment that the rejection was based upon some prohibited discriminatory ground. Reasons which could justify rejection of a purchaser might include any of the following, all of which should be spelled [out] with some specifically [sic] depending upon the particular facts involved."

Amended Complaint, Ex. E. This paragraph is then followed by 15 potential reasons why an application might legitimately be denied.

PLAINTIFFS' NOTE: The above highlighted

out purportedly acceptable reasons for denying a purchase application, is also the subject of much dispute between the parties. The affidavits and depositions of various parties with regard to whether these guidelines were adopted by the board of directors are contradictory. Compare Affidavit of K. Field ¶ 16 ("Plaintiffs do not and cannot allege that the Board resolved to adopt those guidelines because in fact, it did not.") with Esposito Deposition at 543 (board of directors approved Cooperative Guidelines). Clearly a dispute exists regarding the applicability and enforceability of the Cooperative Guidelines. Although the relevance of the document is not yet completely clear, it presents a triable issue of fact on the question of pretext.

Third, the plaintiffs contend that, contrary to the dictates of the Cooperative Guidelines, in denying the plaintiffs' application the defendants failed to give the plaintiffs contemporaneous reasons for the rejection. Aside from the question of whether this violates the allegedly-adopted guidelines, the fact that the 14 reasons stated by defendants as supporting their decision were not transmitted to the plaintiffs at the time of rejection, and were first enunciated some time after the plaintiffs challenged the board's decision, contributes to the plaintiffs' claim of pretext."

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words--an essential part of the Guidelines' "precatory paragraph"--were omitted from the district court's September 5, 1990 Opinion (Cf. A-85-86, which reprinted the actual document)

OPINION OF THE DISTRICT COURT, August 12, 1991

GOETTEL, D. J. :

Following a quick jury verdict in their favor, after several years of incredibly fractious litigation and the denial of the plaintiffs' motion for a new trial, all of the defendants now move for attorneys' fees and sanctions pursuant to: (1) Rule 11 of the Federal Rules of Civil Procedure; (2) Federal Fair Housing Act, 42 U.S.C. §3613(c); (3) 28 U.S.C. §1927; and the general powers of the court.

FACTS[1]

This contentious litigation arises from a relatively simple set of facts. Defendant 16 Lake Street Owners, Inc. is the owner of the real property and cooperative apartment building located at 16 Lake Street, White Plains, New York. Defendants Field, Hobby, Haedke, W. Iolonardi and Rifkin, constituting the Board of Directors, are authorized to act upon applications to purchase stock and the corresponding proprietary lease as well as applications to sublet apartments in the building. John McFadden is the proprietary lessee for apartment 2C of the 16 Lake Street building and is the owner of 548 shares of stock in 16 Lake Street Owners, Inc.[2]

By contract dated October 29, 1987, John McFadden agreed to transfer his 548 shares of stock in 16 Lake Street Owners, Inc. and the proprietary lease for apartment 2C, to plaintiffs Elena Ruth Sassower and Doris L. Sassower. After the agreement was signed, Elena Sassower and her father, George Sassower, took possession of the apartment as their principal

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[1] The facts of this action have been set forth in some of the numerous prior decisions in this case. Rather than go through it again, we will simply repeat the facts from our decision dated September 5, 1990. See Sassower v. Field, 752 F. Supp. 1182 (S.D.N.Y. 1990).

[2] John McFadden, formerly a plaintiff in this action, voluntarily discontinued his claims against the defendants by order signed by the court on June 15, 1990.

residence in accordance with the contract terms. They remain in possession to date. In January 1988, the plaintiffs applied for a loan commitment to purchase the stock shares and proprietary lease for apartment 2C and received that commitment in April 1988. In May 1988, the plaintiffs were interviewed by certain members of the admissions committee of 16 Lake Street Owners, Inc. By letter to the defendant DeSisto Management, Inc, the managing agent for 16 Lake Street Owners, Inc., dated May 19, 1988, the Board of Directors denied the plaintiffs' application to purchase the stock shares and proprietary lease for apartment 2C from John McFadden. By letter dated May 20, 1988, DeSisto Management informed the plaintiffs of this decision. The plaintiffs and John McFadden subsequently requested that the Board of Directors reconsider its decision. On June 14, 1988, the Board of Directors unanimously voted to deny the plaintiffs' request for reconsideration of the original decision disapproving the purchase application.

In August 1988, the plaintiffs commenced this lawsuit alleging eight causes of action against the various defendants. Those actions may be summarized as follows: violations of the federal Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1982); violations of the federal Civil Rights Act, 42 U.S.C. § 1983 (1982); violations of New York Human Rights Law, N.Y. Exec. Law § 296(5)(a) (1982); violations of New York Civil Rights Law, N.Y. Civ. Rights Law § 19-a (1982); failure to comply with the provisions of the corporate by-laws and the proprietary lease governing transfers; breach of the duty of good faith; intentional infliction of emotional distress; unequal treatment of shareholders; breach of fiduciary duty; and failure to comply with its own policies. The plaintiffs' allegations of discrimination, contained primarily in the first cause of action, are based on their contention that the defendants' decision to deny their application to purchase the shares and proprietary lease for apartment 2C was made on account of their status as single, Jewish women.

PLAINTIFFS' OBJECTIONS TO LIABILITY FOR PAYMENT OF ATTORNEYS' FEES

Before addressing the merits of the motions, a number of objections made to the propriety of giving defendants any attorneys' fees or sanctions must be considered. First, plaintiffs contend that they may not be held responsible for any sanctions or attorneys' fees under any of the foregoing provisions, claiming that the defendants are not the real party in interest to make such an application. They argue that since the cooperative, 16 Lake Street Owners, Inc., had insurance, and since the insurer has paid the cost of most of the defendants' attorneys, in whole or in part, the insurance company, State Farm Mutual, is the real party in interest and, therefore, defendants cannot seek such costs. The argument is absurd. Most defendants who are sued have insurance and, if sued on a matter within the scope of coverage, the insurance company pays the attorneys selected to represent them. However, the attorney's client is the insured and not the insurance company. When an insured party prevails under a circumstance allowing the recovery of sanctions or fees, it is the insured who makes the application even though the monies may ultimately revert to the insurance carrier as reimbursement for fees paid.

Plaintiffs cite only one case, United States v. Aetna Surety Co., 338 U.S. 366 (1949), for their novel proposition that the carrier must make the application. That case concerned the limitation in the Federal Tort Claims Act, 31 U.S.C. § 203, against assigning claims against the United States. The Court held that if an insurance company pays its insured's claim it becomes subrogated to the claim and may sue in its own name without violating the Federal Tort Claims Act. 338 U.S. at 380-81. Clearly, that case is no authority for the proposition that insured defendants have no right to recover legal fees or sanctions when their defense had been paid by the insurer.

Plaintiffs also argue that the attorneys, having agreed to work at a particular fee specified by their client's insurer, may not seek any greater sum even if the insurer is only paying a part of the fee. Obviously, the hourly fee which the attorney agrees to accept from an insurance carrier is something to be considered in determining an appropriate attorney's fee. However, it is not conclusive on the question of what hourly billing rate a

prevailing attorney is entitled to. Cf. Tolliver v. Amici, 800 F.2d 149, 152 (7th Cir. 1986) (granting reasonable attorney's fees to prevailing plaintiff who had agreed to contingency fee arrangement).

An additional argument made by the plaintiffs is that neither attorney's fees nor sanctions may be awarded absent a "plenary and jury determination as a matter of right ... with confrontation and subpoena rights." Plaintiffs' Memorandum of Law at 15, citing Tull v. United States, 481 U.S. 412 (1987). Tull concerned the right to a jury trial in an action brought by the government, seeking penalties and injunctive relief under the Clean Water Act. The penalties sought in that case bear no relationship to the type of sanctions and fees sought here. Here, the defendants' application does not arise out of a case or controversy but instead rests upon the inherent power of the court to manage its own proceedings and control the conduct of those appearing before it. The determination of liability therefore is vested in the sound discretion of the court and no jury trial is necessary. Moreover, Tull holds that the Seventh Amendment does not guarantee a jury trial to assess civil penalties and that such assessments may be done by the trial judge, which is directly contrary to the plaintiffs' position. Id. at 427. The plaintiffs' reliance on Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1991), for the proposition that they are entitled to a jury trial is similarly misplaced. That case, too, has nothing to do with sanctions or attorneys' fees but, instead, addresses the respective responsibilities of the judge and jury in actions seeking both equitable and legal relief.

Plaintiffs maintain that it is premature for the defendants to be making this application and that it should await decision of their appeal. Defendants have received final judgment following a full trial on the merits, motions requesting a new trial and the recusal of the trial judge have been denied, and the litigation is now concluded. The application for attorneys' fees and sanctions is thus appropriate at this time. Indeed, to defer it until after the appellate decision could result in piecemeal appeals.

Finally, plaintiffs and their various attorneys contest their liability for fees and sanctions under each of the statutes and rules upon which the defendants rely. These will, therefore, be considered separately.

A. **The Fair Housing Act**

At the time the complaint in this action was first filed, the Federal Fair Housing Act, 42 U.S.C. §3612(c), provided that only a prevailing plaintiff could recover his attorneys' fees. A month later, on September 13, 1988, the Act was amended to provide for recovery of fees by the "prevailing party," effective six months thereafter. See 42 U.S.C. §3613(c)(2) (West Supp. 1991). When a decision involves a procedural matter such as attorneys' fees or sanctions, a court normally applies the law in effect at the time it renders its decision, even if a change in the law occurs after the trial and during the pendency of an appeal, provided that such application would not work a manifest injustice. Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974).

Plaintiffs argue that it would be unjust to retroactively apply the amended attorneys' fee section of the Fair Housing Act. However, the plaintiffs amended their complaint twice after the new provision became effective, adding new claims of economic loss and emotional distress and seeking compensatory damages. They carried the case forward to an ultimate trial despite warnings that the act could result in their being responsible for fees. Moreover, the original complaint, when filed, included a federal civil rights claim under which attorneys' fees are payable to the prevailing party. (These counts were dropped before trial.) See, 42 U.S.C. §§ 1983, 1988. Given that plaintiffs were subject, in any case, to attorneys' fees when their complaint was filed, we find nothing manifestly unjust in holding the plaintiffs responsible, under the Fair Housing Act, for the reasonable attorneys' fees paid to defense counsel after the amendment became effective.

Plaintiffs also argue that, regardless of the language of the statute, it should be construed to require the payment of attorneys' fees by a losing plaintiff only if their action is totally meritless. Even were that the rule of law, we would find plaintiffs responsible for fees to the prevailing party since the action was totally meritless, as described more fully below.

B. **Rule 11 of the Federal Rules of Civil Procedure**

Rule 11 states, in relevant part, that:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law ... that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The purpose of Rule 11 sanctions is to deter the filing of frivolous and abusive actions. Pavelic & LeFlor v. Marvel Entertainment Group, 493 U.S. 120, 110 S. Ct. 456, 460 (1989). Unlike § 3613 of the Fair Housing Act, Rule 11 is not intended to be a fee shifting device. Instead, the Rule was designed to deter both attorneys and clients from abusing the judicial process. Therefore, Rule 11 sanctions can be assessed against either an attorney or client, or both.

This case was commenced by Doris and Elena Sassower who claimed that the co-op board rejected their application for purchase because they were Jewish unmarried females.[1] Plaintiffs were aware that there were other Jews living in the building and that, indeed, the sponsors of the co-op were Jewish. They also knew, or certainly could have found out had they made inquiry, that there were other single females in the building. At the time the application was rejected, they were advised that the primary objection to the purchase concerned George Sassower, formerly the husband of Doris Sassower, and

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[1] John McFadden, who originally was a plaintiff, was the seller of the apartment and purportedly lost his opportunity to complete the sale to the Sassowers as a result of this alleged discrimination.

the father of Elena Sassower.[4]

The record is clear that the neighbors objected to George Sassower, who was the primary occupant of the apartment. Testimony at trial revealed that he was arrested at the apartment. (We believe that the arrest was for the illegal practice of law.) After his arrest, which was witnessed by some of the building residents, Elena Sassower asked some of the Board members if the arrest would impact their application. Those queried politely said that that event would not influence their feelings about the application, but, as it turned out, there were additional objections to George Sassower lurking in the hallways and smoking cigars. Another problem with the application was that the prospective purchasers were Doris Sassower, her son-in-law (both of whom had assets but did not intend to reside in the building) and Elena Sassower, who has at times lived in the apartment but lacked personal assets to make the purchase.[5] A suspicion was held by the Board members that the apartment was primarily intended as a residence for George Sassower who apparently lacks assets and viable means of support and had received no equitable distribution in the divorce from Doris Sassower.[6] As the evidence at the trial clearly indicated, there were a number of other considerations which made the application for purchase unacceptable to the 16 Lake Street owners, but none of them had anything whatever to do with the fact that Doris and Elena

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[4] George Sassower is a disbarred attorney. George Sassower has been held in contempt on several occasions. He took to filing totally frivolous and demented actions against judges throughout this area. When he was barred from filing any further such frivolous actions in this and surrounding districts, as well as appeals to the Court of Appeals for the Second Circuit, he simply shifted his activities to other circuits. These actions are routinely dismissed.

[5] At one point during this litigation, she applied for assignment of counsel, claiming to be indigent.

[6] The fact that George Sassower has no assets has enabled him to file his numerous scurrilous actions and claims since there are no assets from which to effect a recovery from him. Testimony at trial revealed that Mrs. Sassower resided in a two million dollar mansion and that Elena is an occasional resident there.

Sassower were Jewish or currently unmarried. The action was instituted and carried forward at the instigation of Doris Sassower, who was then a practicing attorney herself,[7] for purely monetary gain.

Plaintiffs make several argument against the application of sanctions to them. First, they argue, citing Business Guides v. Chromatic Communications, ___ U.S. ___, 111 S. Ct. 922 (1991), that sanctions can be invoked only against the person signing the pleading, motion or paper involved. Business Guides concerned a situation in which the corporate client had signed papers in a motion for a temporary restraining order and preliminary injunction. The lower courts had sanctioned the client upon finding that these papers had been filed without reasonable inquiry by the party as required by Rule 11. (The issue of whether the attorneys should have detected the absence of reasonable inquiry was mooted by the bankruptcy filing of the firm involved.) The Supreme Court held, unequivocally, that Rule 11 applies to represented parties although it did so in the context of a represented party who signed certain papers. It noted, however, that the Court was not "convinced that, as a policy matter, represented parties should not be held to a reasonable inquiry standard. Quite often it is the client, not the attorney, who is better positioned to investigate the facts supporting a paper or pleading. This cases is a perfect example." Business Guides, 111 S. Ct. at 932. The Court then went on to hold that parties, whether proceeding pro se or when represented by counsel, are held to the same objective standard of reasonableness and are bound to make a reasonable inquiry into the facts and the law when signing documents to be submitted to the court. Id. at 933.

We have a hybrid situation in this case. Both of the plaintiffs were represented at one time or another by several attorneys or trial counsel. In addition, both of them, at times, appeared pro se. During the course of this lengthy proceeding, both of them signed numerous documents. Moreover, both

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[7] Mrs. Sassower has recently been suspended from the practice of law pending an examination by a qualified medical expert to determine whether she is "incapacitated from continuing to practice law." See Matter of Sassower, N.Y.L.J. (June 21, 1991).

directed the actions of the attorneys and trial counsels who were retained. We believe that under these circumstances the plaintiffs, both as represented parties and as pro se litigants, may be held responsible for Rule 11 sanctions should such be appropriate. To the extent that their activities may fall outside the ambit of Rule 11, plaintiffs can clearly be sanctioned under the inherent power of the court to monitor its own proceedings and to control the conduct of those who appear before them. Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991). Indeed, in Chambers v. NASCO, supra, the Court determined that the petitioner, both when represented by counsel and when appearing pro se, took acts intended to degrade the judicial system and unreasonably and vexatiously multiplied proceedings and upheld the district court's imposition of sanctions. It is our view that the plaintiffs here were guilty of that, as well. (See discussion of sanctions under 28 U.S.C. § 1927 below.)

No motion has been made seeking sanctions against the attorneys who served merely as trial counsel for the plaintiffs, David B. Cohen, who appeared of counsel to Eli Vigliano, who was representing Mrs. Sassower, and Jeremy Morley, who was plaintiffs' trial counsel. However, sanctions are sought against their counsel of record, Peter Grishman and Eli Vigliano and also McFadden's attorney, James Glatthaar. Each of them argues that he signed only certain of the papers submitted in the action and did so upon a belief that the information being supplied by the plaintiffs was accurate. We will consider the arguments of the attorneys separately.

Plaintiffs argue that since sanctions are not sought against trial counsel Cohen and Morley, none can be assessed against them. This is simply incorrect. With respect to Cohen, who never appeared as counsel of record, his activities during discovery might conceivably have been the basis for the seeking of sanctions. However, since he was only of counsel to Vigliano, and withdrew after a few months reportedly complaining of the hardships of dealing with the Sassowers, sanctions against him would be excessive.

As to Morley, we see no basis for sanctions whatsoever. Once he became trial counsel, he attempted to trim back the excesses of the Sassower to the extent possible. He also tried the case in a reasonable and appropriate manner despite the occasional objections of his clients. (Indeed, to this date, they

object to the manner in which he tried the case, blaming their failure to prevail on him rather than the lack of merit in the case.)

C. **Sanctions Pursuant to Title 28 U.S.C. § 1927**

Title 28 U.S.C. § 1927 (1988) provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

The Sassowers pursued this litigation as if it was a holy war and not a court proceeding, managing these proceedings in a fashion that vexatiously, wantonly and for oppressive reasons increased the legal fees enormously. Oliveri v. Thompson, 803 F.2d 1265, 1272 (2nd Cir. 1986), cert. denied sub nom, Suffolk County v. Grasek, 480 U.S. 918 (1987). They made several unsupported bias recusal motions based upon this court's unwilling involvement in some of the earlier proceedings initiated by George Sassower. See, e.g., Affeldt v. Carr, 111 F.R.D. 337 (N.D. Ohio 1986) (Rule 11 sanctions imposed on attorney who filed recusal motions in an attempt to interfere with proceedings), aff'd 827 F.2d 769 (6th Cir. 1987). There were continual personal attacks on the opposing parties and counsel.[8] (See discussion of plaintiffs' latest motion for a new trial below.) In virtually every instance where a court ruling was not satisfactory to them, plaintiffs routinely made a motion to reargue. In addition, the plaintiffs filed two improper

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[8] Typical of this was Doris Sassower's statement to opposing counsel during her deposition: "Again, are you crazy? You are totally so out of order and so improper. You are totally an unprofessional, despicable individual." Deposition of Doris Sassower (May 16, 1990) at 102-103.

interlocutory appeals which were subsequently withdrawn.[9] This, too, is improper. Shields v. Shadler, 120 F.R.D. 123 (D. Colo. 1988). Finally, they have now filed a mammoth motion for a new trial and sanctions against opposing counsel which seeks to reargue virtually every aspect of the litigation for the third time. (See discussion below.) Imposition of sanctions under § 1927 requires a clear showing of bad faith. Oliveri v. Thompson, 803 at 1273. In this instance, this court has not hesitation in finding that the plaintiffs acted in bad faith,[10] vexatiously and unreasonably.[11]

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[9] Defendants waived any claim to attorneys' fees as to one of these appeals. Because we believe that the issue of an improper appeal is a matter more properly in the hands of the appellate court, we do not consider costs in that regard.

[10] Among other things, the plaintiffs attempted to communicate directly with the defendants rather than through counsel in order to force through their settlement demands.

[11] We note that we are not the first court to reach such a conclusion concerning the litigating tactics of Doris Sassower. Justice Samuel G. Fredman, of the Supreme Court of the State of New York, County of Westchester, in a contempt proceeding concerning Doris L. Sassower, described what he terms a veritable nightmare experience:

> From the relatively simple molehill of potential issues which could possibly arise from such conduct, Sassower has created a mountain of legal, factual and even political abracadabra. Her actions have taken an inordinate amount of this Court's time and tested its patience beyond the wildest imagination.

Breslaw v. Breslaw, Slip Op., Index No. 22587/86 (June 24, 1991), at 2. Elsewhere in that decision he speaks of

> months of actual court time spent in permitting Sassower to preserve her rights by trick and chicanery beyond the concept of most any lawyer who practices in our courts. She is indeed sui generis in her actions, but she who litigates by the stiletto must face its rebound

More particularly, we look to the plaintiffs' behavior with respect to Doris L. Sassower's own discovery. The discovery in this matter, an onerous task, was supervised by now retired Magistrate Judge Joel J. Tyler. By a report and recommendation dated March 27, 1990, he recommended dismissal of her complaint because of her egregious failure to make discovery as directed by the court. In response thereto, she filed a motion for an order disaffirming the report and remitting the matter to the Magistrate Judge for a ruling on the discovery practices of the defendants. Since there was no procedural basis for such a motion, we treated it as simply opposition to the Magistrate Judge's recommendation and held, in our memorandum decision dated April 19, 1990:

> Essentially, her objections attempt to argue the underlying facts and continues to claim that it would be a danger to her health to be deposed in this case. We find it very strange that filing motions, conducting depositions, negotiating a change in the escrow money status on the contract at issue, and, in general, performing the functions of an attorney, are apparently not threatening to her health, but that to appear as a witness answering questions at a deposition purportedly would be. According to the Gannett Westchester newspaper of April 12, 1990 (page 11), there have been contempt proceedings pending against Doris Sassower in Westchester County Supreme Court for about a half of a year. They have had to be adjourned three times because of her claim of ill health. It is not surprising that she should feel under some stress and prefer not going forward with that proceeding. However, she has been very vigorous in her litigation in this case.

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when it falls the other way.

Id. at 12.

> Doris L. Sassower further argues that the report could not be adopted because a hearing is legally required before such an order could issue. However, since the hearing would concern her physical condition and she has foreclosed inquiry of her doctors on that subject, we find this argument unpersuasive. She also opposes the magistrate's alternative recommendation that if the action not be dismissed she should be directed to peremptorily appear for a deposition with no further excuses to be accepted. She argues that her subsequent failure to appear for a deposition would have to be ignored unless it was "willful or inexcusable" and, since she claims her mental and physical state prohibit her appearance, that would not be likely to come to pass.
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> It is patently clear that Doris L. Sassower has been guilty of attempting to manipulate the court by appearing as attorney on those matters which could assist her case while refusing to be deposed herself, claiming health problems. We were compelled at an earlier time to allow Doris L. Sassower to appear pro se and to relieve her attorney because of the law in this Circuit, even though we could foresee the type of manipulation that has subsequently occurred.

This court then noted that since George and Elena Sassower had continued to occupy the apartment in question and that the dismissal of Doris Sassower's complaint would accomplish nothing since her daughter, Elena, could continue the action, no effective sanction would result from accepting the Magistrate Judge's recommendation.[12] We observed, inter alia, that the circumstances appeared to warrant monetary sanctions

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[12] We did, however, preclude Doris Sassower from testifying at trial. Subsequently, she appeared for deposition and was allowed to testify at trial.

but in light of the fact that attorneys' fees could be awarded at the conclusion to the prevailing party, the matter could await the end of the action.

In addition to her recalcitrance in her own deposition, Doris Sassower assisted her friend and attorney, Eli Vigliano, in conducting incredibly harassing depositions of certain of the defendants. These will be discussed in more detail in the section below concerning Mr. Vigliano.

The principal opposition offered by the plaintiffs is that § 1927 is limited only to attorneys and should not be applied to an attorney who appears pro se. We do not agree with that assertion. The section applied to attorneys "or another person admitted to conduct cases." The plaintiffs sought and were granted permission to proceed pro se. As the Ninth Circuit stated in a case involving a pro se litigant who was not an attorney:

> Section 1927 sanctions may be imposed upon a pro se plaintiff, despite [plaintiff's] protestations to the contrary. See, e.g., Woods v. Santa Barbara Chamber of Commerce, Inc., 699 F.2d 484, 485-86 (9th Cir. 1983) (cert. denied), 465 U.S. 1080, 104 S.Ct 1445, 79 L.Ed.2d 765 (1984).

Wages v. I.R.S., 915 F.2d 1230, 1235-1236 (9th Cir. 1990), cert. denied, 111 S.Ct 986 (1991). Additionally, we note that § 1927 sanctions can be imposed on an attorney and client jointly and severally when they are equally blameworthy with respect to the dilatory and vexatious conduct of the trial. Kendrick v. Zanides, 609 F. Supp. 1162, 1173 (N.D. Cal 1985). Finally, even if we were to take the view of the Fifth Circuit that § 1927 applied only to attorneys, sanctions can be imposed on both plaintiffs under the inherent power of the court because of their tactics of delay, oppression and harassment. Chambers v. NASCO, supra, 111 S. Ct. 2123.

THE PARTIES AND ATTORNEYS RESPONSIBLE FOR ATTORNEYS' FEES AND SANCTIONS

The Sassowers

Having determined that the circumstances of this case warrant sanctions, the culpability of the various parties must now be assessed. As indicated in the earlier sections, we believe that both plaintiffs can be held responsible for all of the types of sanctions sought. An argument can be made that to the extent that the sanctions such as Rule 11 are intended to deter plaintiffs rather than reimburse the defendants and to control the conduct of the litigants, there is little hope of them having any effect upon Doris Sassower. While she is not in the same league as her former husband, George Sassower, when it comes to frivolous litigation she has, nevertheless, been a litigant in a large number of suits. Moreover, sanctions imposed by courts in earlier litigations did not restrain the actions by Doris Sassower in this case.[13] Nevertheless, for whatever deterrent effect it may have, sanctions are appropriate against her.

As to Elena Sassower, because of her relative youth (she is in her 30's) and the fact that she has not been an attorney admitted to practice, the facts are not so egregious. While we do

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[13] Indeed, to quote a distinguished state colleague:

> Sassower is accustomed to "getting away with murder" in the Court system; there is not a single one of my colleagues who would go to bat for her or accept her word; this is also true as to her confreres at the Bar, very few of whom, if any, would raise a finger in her defense. She has walked to the edge of the ledge of contempt and/or sanction, including for this very same offense, on prior occasions. ... I invite the Grievance Committee to study the record of this proceeding to determine if someone who so misstates and mistreats the American legal system ought to be afforded the opportunity to continue to harass the weak and the downtrodden as she has evidently done, time and time again.

Breslaw v. Breslaw, supra, at 14; see also Muscolino v. Muscolino, Supreme Court, Westchester County, Index Number 2252/1986.

not believe that she if financially able to respond in the payment of attorneys' fees and sanctions,[14] so that these costs will probably have to be borne solely by her mother, we find it nevertheless appropriate to administer those costs against her jointly with her mother.

Peter Grishman

Peter Grishman was the attorney for both of the Sassowers when this action was initiated. As an attorney, he is not responsible under the Fair Housing Act for fees. In any case, Grishman withdrew from the case at about the time the amendment to the Act allowing prevailing parties to recover became effective.[15]

With respect to administering sanctions under Rule 11 and § 1927, the only serious charge made against Grishman by defense counsel concerns an attempt by the plaintiffs themselves to settle the case directly with the defendants, going around defense counsel. Part of plaintiff's tactics was use of a letter written to defense counsel by Grishman. He states, however, that he was not personally responsible for the forwarding of this letter to the defendants. Grishman defends his drafting of the complaint by arguing it was based on information provided to

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[14] Midway through the litigation, Elena Sassower asked for the appointment of counsel, since she claimed to be indigent. Considering that her mother was being represented by Mr. Vigliano and they were united in interest, there was no basis for the granting of such a motion. However, it is some indication of her financial status.

[15] He was substituted out of the action by Doris L. Sassower who sought to represent herself in the spring of 1989. He was relieved by court order in March 1989 from representing Elena Sassower when he learned that, without his knowledge, they had made deals with then co-plaintiff McFadden and one of the defendants concerning an escrow fund.

Grishman states that he was only partially compensated for his services to the Sassowers, and decided to forego any further claims against the Sassowers. He also states that he had indicated to defense counsel early in the proceedings that he was thinking of withdrawing, but at least one of the defense counsel stated that he would object to the application because he was the only reasonable voice speaking for the plaintiffs.

him by his clients and the co-plaintiff. He also contends that this court's denial, in part, of the defendants' motion for summary judgment on the grounds that plaintiffs had set forth a prima facie case against certain of the defendants, demonstrates that it cannot be said that his actions were to any degree improper.

The fact that summary judgment was not granted in favor of those defendants who made the decision not to accept the Sassowers as owners, does not, as Grishman argues, and as others have contended, show that there was colorable merit to the case. The plaintiffs fell into a protected class, and at least cumulatively had the assets to complete the purchase. They claimed that their rejection was based on anti-Semitism and some peculiar bias against unmarried females. The question of the 16 Lake Street Owners Board's motives was not a matter that could be resolved on papers because credibility was in issue. Thus, a trial was needed. However, at its conclusion, the jury, as finders of fact, rapidly resolved the credibility issues against the plaintiffs. Nevertheless, we do not see that the actions of attorney Grishman merit the invocation of Rule 11 sanctions or § 1927 sanctions.[16]

Eli Vigliano

Eli Vigliano is an attorney with an office in Yonkers.[17] During the litigation, Vigliano had revealed that he appeared in this action because of his personal relationship with Doris Sassower and not as a paid attorney. We note, however, that in papers submitted in this application, Vigliano had renewed his claim to recover counsel fees. In any case, his paid or unpaid

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[16] In this regard, we note that the supervising Magistrate Judge had no criticism of his actions while in the case and that Grishman promptly notified the Magistrate Judge of what he believed to be improper dealings between the plaintiffs and one defendant.

[17] He claims to be a Professor of Law at Pace University School of Law. However, he has not been listed in the Pace catalogs for the last four years as either a full-time professor or an adjunct professor. Inquiry at the Law School reveals that he did teach a single course some five years ago.

status is not dispositive of his potential responsibility for Rule 11 or § 1927 sanctions.[18] Vigliano points out that during the year he acted as Doris Sassower's attorney, he retained David B. Cohen to do most of the work for him, and that, at trial, Jeremy D. Morley acted as counsel for both plaintiffs, although Vigliano was present at the trial and participated to a limited extent. Consequently, he notes that very few of the documents that were filed were over his signature and that only one of the objectionable ones concerned an attempted interlocutory appeal. (See fn. 9 and accompanying text, supra.) On the basis of documents, trial work and the complaint, we do not find him responsible for Rule 11 sanctions. However, Vigliano conducted some of the discovery depositions of the defendants. Two of them were particularly shocking and abusive. During the deposition of Director Daisy Hobby, a black woman, he asked her many totally irrelevant racial questions pertaining to persons uninvolved in the case, for the obvious purpose of stirring her up against her co-defendants and in favor of the plaintiffs.[19] The questions he asked were reprehensible and clearly in violation of § 1927. He proceeded in the same fashion during the deposition of Curt Haedke. We find that these actions violated § 1927 and require sanctions.

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[18] He also points out that he was relieved as attorney for Doris Sassower following the trial of the action but we do no see the pertinency of that fact.

[19] Some of the irrelevant questions asked of Mrs. Hobby were:

(1) Mrs. Hobby, do you remember the second World War?
(2) Did you ever hear of a woman named Marian Anderson?
(3) Now, did you ever hear of Jackie Robinson?
(4) Before Jackie Robinson played in the major league, were there any blacks playing baseball in the United States?

The deposition continued in that tenor, pursuing irrelevant and improper questions.

Co-Plaintiff McFadden and his Counsel

John McFadden was in a peculiar position throughout the events leading up to and during this litigation for several reasons. At the time of the application by the Sassowers to buy the apartment, although he no longer resided at 16 Lake Street, McFadden was still the President of the Co-op Board. As the president, he had easy access to, and the complete cooperation of, the Board's attorney, Roger Esposito, and the management company, DeSisto Management, Inc., which contracted with the Board to handle certain business aspects. With their assistance, he was able to informally cut certain corners with respect to the Sassowers' occupancy under a sub-lease. Indeed, purportedly with Board permission, Esposito was representing McFadden on the transfer and sale.

When it became clear that the board was not going to accept the Sassower application, McFadden was in a difficult position. Neither he nor, for that matter, the Board could get George and Elena Sassower to vacate the apartment. (To date, they continue to occupy the apartment while a landlord-tenant proceeding drags on in White Plains City Court.) Additionally, McFadden had only a limited time under the International Revenue Code to sell the apartment or suffer adverse tax consequences. Consequently, his personal interests supported the sale to the Sassowers. Moreover, the Sassowers made it clear that if he did not join them as a party voluntarily, he would be joined involuntarily as a defendant.[20] McFadden's cooperation was additionally valuable to the Sassowers because (1) it provided insight into the rather informal and loose manner in which the Board of the cooperative apartment operated and (2) his participation as plaintiff permitted the complaint and the first amended complaint to appropriately contain causes of action based on McFadden's role as a shareholder in 16 Lake Street Owners, Inc., which complained of a lack of formal process and

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[20]His counsel now states "Mr. McFadden was coerced by plaintiffs Elena Ruth Sassower and Doris L. Sassower to join as plaintiff." McFadden Memorandum at 13.

adherence to the co-op's by-laws in the application procedure.[21] McFadden, thus, was placed in a compromised position. He, himself, was a shareholder in the cooperative and any damages which might have to be paid could come in part from him,[22] since, McFadden states, the insurance carrier reserved its rights to disclaim its coverage under the policy. Moreover, he and his attorney found that they were aligned with rather difficult co-plaintiffs. They considered in 1989 getting out of the case and in May 1990, McFadden finally moved to be allowed to withdraw from the action. The Sassowers objected to this, arguing primarily that they needed his evidentiary assistance in the case. When he agreed to cooperate in that regard, their objections were withdrawn and his motion was granted.

McFadden was a participant in the proceedings for over a year after 42 U.S.C. § 3613(c) made attorneys' fees available to the prevailing party. However, he points out that when the defendants became prevailing parties, he as no longer an opposing party. Moreover, he argues that he withdrew as soon as it became apparent that it was unreasonable to continue litigation. See Oliveri v. Thompson, 803 F.2d at 1277 (awareness of evidence showing claim was not colorable requires discontinuance of action). He claims that, as early as October

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[21] The Sassower plaintiffs took a curious approach to these causes of action. They believed that even after McFadden withdrew as plaintiff that as applicants to be stockholders they had a right to pursue these causes of action. Moreover, they seemed to believe that procedural infirmities in the manner in which the application was rejected would result not merely in a direction that they be properly performed, but in the awarding of the apartment and shares in the cooperative to them, along with substantial damages.

[22] The plaintiffs object to the cooperative's insurance carrier providing the costs of representation in this action, arguing that it is contrary to public policy to have insurance against being sued for the commission of discriminatory acts. We believe they are wrong in that regard to the extent that you can be insured against the unjustifiable assertion of such claims. Had the plaintiffs prevailed, the question of whether the insurance company could properly indemnify the Board for any damages payable as a result of housing discrimination would be an entirely different matter.

1988, before the amendment became effective, he told his counsel that he wished to withdraw and was told that this would only be feasible after his deposition had been concluded. This did not occur until September 1989. Under these circumstances, we agree that he cannot be held responsible for attorneys' fees under the Fair Housing Act.

There is no claim that either McFadden or his attorney were responsible for causing the case to proceed unreasonably or vexatiously. Unlike the Sassowers, he did not make motions for reargument, for amendment, for delays in discovery, or to compel additional discovery, nor did he move to sanction anyone. McFadden is, however, charged with improperly attempting to settle the matter directly with the defendant board by going around defense counsel. In light of the fact that he was a shareholder in the defendant corporation, as well as a former neighbor and close associate of the board members, his impropriety in that regard can be overlooked.

When we come to Rule 11, however, a much closer question emerges. McFadden points out that neither he nor his attorney signed the complaint and that very few of the other documents in the case were signed by them. While this is true, McFadden and his counsel did join in the suit. Their primary wrongdoing was in suing McFadden's own previous attorney and the management agent, both of whom had worked on his behalf when he was trying to get the sale of the apartment to the Sassowers approved by the Board. In his affidavit in opposition, at ¶ 31, McFadden states:

> I have spoken with Roger Esposito many times both before and after this action was commenced. He was the attorney representing me in the sale of Apt. 2C to co-plaintiffs Elena Ruth Sassower and Doris L. Sassower and was the attorney for 16 Lake Street Owners, Inc. I have always told him that I regret his having been dragged into this action. Nor have I ever understood the reason why he was named a party to this action.
>
> * * *
>
> I also spoke with Anthony DeSisto both before and after this action was commenced. I

> also told him I regretted having been dragged into the action. I also was not sure why his company was a party.

His attorney, James W. Glatthaar, takes much the same position. In his affidavit at ¶¶ 23, 24 and 25, he states:

> I respectfully submit that I, at all times, opposed the naming of DeSisto and Esposito as parties to this action. I felt this way for several reasons. First, Esposito was the attorney who represented John McFadden in the proposed sale of Apt. 2C. I could find nothing in his representation that was improper. Second, neither Mr. DeSisto nor Mr. Esposito had decision-making powers in connection with this application. Third, Mr. Esposito's former law firm is counsel to Broadpark Lodge Corp., a cooperative corporation of which I am a shareholder and past president. As a president I dealt with Mr. Esposito from time to time. Forth, I saw no basis for claims against either DeSisto or Mr. Esposito. Finally, I spoke with both Mr. DeSisto and Mr. Esposito before the action was commenced. Both indicated their testimony would be helpful.
>
> 24. Notwithstanding the above, the action was commenced within one (1) week after I first met with Doris L. Sassower. She insisted upon commencing the action instantly before her mortgage commitment expired. She was insistent that DeSisto and Mr. Esposito be named as a party for their role in this matter.
>
> 25. After the action was commenced Mr. McFadden and I discussed the possibility of stipulating to discontinue. We also discussed the possibility of allowing DeSisto and Mr. Esposito to be dropped as parties. However, plaintiffs adamantly opposed such a stipulation.

Their own words attest to the fact that at the time the complaint was filed, both McFadden and his counsel were aware that suit against Esposito and DeSisto was improper. Nevertheless, they allowed the suit in McFadden's name to go forward.

The question, therefore, is whether a knowledgeable plaintiff and an experienced attorney can excuse their actions in suing clearly innocent parties merely to pacify an insistent Doris Sassower. We think not. Either under Rule 11 or the equitable powers of the court, they should be compelled to reimburse Esposito and DeSisto for a portion of their attorneys' fees.[23]

ATTORNEYS' FEES AND SANCTIONS PAYABLE TO DEFENDANTS

The next matter to be addressed is the actual fees and sanctions. We emphasize that all fees and sanctions are to be paid directly to the defendants.

A. Attorneys' Fees Payable by Plaintiffs Under the Fair Housing Act

The attorney for 16 Lake Street Owners, Inc. and the various individual board members, Lawrence J. Glynn, seeks $142,625 in attorneys' fees, as well as costs and expenses in the amount of $850. This is based on 570.5 hours of work billed at $250 an hour. We have already decided that he should not, under the Fair Housing Act, be reimbursed for the time spent prior to March 10, 1989, when the amendment providing for attorneys' fees to a prevailing party took effect. The record indicates that 3/16ths of the time charged was expended during that period. We have also noted that Glynn was accepting $100 an hour from the insurance carrier which leads us to the conclusion that the claimed hourly charge of $250 an hour is excessive.

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[23] Obviously, they were going to be sued by the Sassowers even without McFadden's participation, but his participation exacerbated the problem.

Plaintiffs raise many objections to the time charges, claiming that they are not contemporaneous and are patently deficient and fraudulent. For example, they note that the time sheets of Diamond, Rutman record the same number of hours for the conducting of depositions as does Glynn, attorney for the board and this is indicative of copying. Logic dictates that if both attorneys were present for the deposition, they should have been present for the same number of hours. Conversely, they note that other attorneys bill time for meetings with Glynn that do not appear in Glynn's records. Why they should complain about this as it pertains to Glynn, we cannot imagine. While there may be deficiencies in Glynn's recordkeeping, they are not substantial. However, some of the time billed by Glynn and submitted here concerned the City Court proceedings seeking unsuccessfully to evict the Sassowers and should not be included as part of this case. Under the circumstances, we award him $50,000 in fees, plus $850 for expenses.

The attorney for Hale Apartments, Dennis T. Bernstein, seeks fees for a total of 218 hours at $100 an hour, plus $772 in disbursements. (Some additional time is charged after the granting of summary judgment on behalf of his client.) Of this, however, almost half of the time was spent before the amendment to the Act. His time sheets, plaintiffs' complaints notwithstanding, are quite accurate and informative. His client is awarded $12,000 in fees and $500 in disbursements.

The firm of Diamond, Rutman & Costello, representing defendant Roger Esposito, seeks $39,345.24 based on 466.75 hours, including a little over $2,000 in litigation expenses. Its billing rate is $80 per hour, the lowest of any of the defense lawyers. As with the other attorneys, some of their time was expended prior to the Act being amended and may not, therefore, be awarded to the defendants. We also believe the hours expended are excessive, even allowing for the difficulty of dealing with plaintiffs and their attorneys. In addition, we note that Diamond, Rutman was sanctioned by the Magistrate Judge because of improprieties during discovery and ordered to pay $8,000 to the Sassowers. Under the circumstances, Esposito is awarded only $18,000 for fees and expenses as a prevailing party.

Marshall, Conway & Wright, as attorneys for DeSisto Management, seeks $21,556 in fees and disbursements. Their

time sheets are extremely inadequate in that they do not set forth the amount of time involved or the hourly rate being charged for each service. Indeed, these items are never totalled up. (Hourly expenditures appear only starting on June 27, 1990.) Consequently, DeSisto Management is awarded only $12,000 in attorneys' fees and expenses.

B. Sanctions for Unnecessarily Prolonging the Action Pursuant to 28 U.S.C. § 1927

The effect of prolonging the action was simply to increase the attorneys' fees of the defendants which have been reimbursed above. Consequently, as it pertains to the plaintiffs who are liable for those fees, there is no need to add them on top. However, on the possibility that the awarding of attorneys' fees to the prevailing party pursuant to the Fair Housing Act is not upheld on appeal, we will set forth the amount of § 1927 sanctions which would alternatively be payable by the plaintiffs to the defendants:

To the clients of:

1. Lawrence J. Glynn: $20,000
2. Dennis T. Bernstein: $7,000
3. Diamond, Rutman & Costello: $7,500
4. Marshall, Conway & Wright: $7,500

Eli Vigliano, as noted above, is not responsible for attorneys' fees under the Fair Housing Act or Rule 11 sanctions. However, in light of his behavior at depositions, he is directed to pay $1,000 to Daisy Hobby and $500 to Curt Haedke.

C. Rule 11 Sanctions

These sanctions are not directly connected with the fees expended by the defense attorneys nor can they be prorated in that fashion. We find that the appropriate sanction against the plaintiffs for commencing and prosecuting this meritless litigation is the sum of $50,000. However, we note that the total attorneys' fees to be paid under the above disposition far exceeds that amount. Consequently, as to the plaintiffs who must pay those fees we do not believe that Rule 11 sanctions need be administered as an additional sanction. In the event that it should ultimately be held that they are not required to pay

attorneys' fees under the Fair Housing Act, these sanctions will stand with one-half to be paid to the clients of Lawrence J. Glynn and the remainder to be distributed equally among the clients of the other firms.

As noted earlier, John McFadden and his counsel are in violation of Rule 11 independently with respect to their suing DeSisto Management and Roger Esposito. We assess Rule 11 sanctions against that plaintiff and his counsel, jointly and severally, in the amount of $3,000 to be paid to DeSisto Management and $3,000 to be paid to Roger Esposito.

THE PLAINTIFFS' MOTION FOR SANCTIONS ATTORNEYS' FEES AND A NEW TRIAL

Plaintiffs move for sanctions, attorneys' fees and a new trial under Rule 60(b)(3) of the Federal Rules of Civil Procedure. This motion was made months after the trial and weeks after receiving the defendants' motion for sanctions and attorneys' fees, while plaintiffs were complaining that they had inadequate time to respond to their opponent's motion. Rule 60(b)(3) permits a motion for relief from judgment or order based upon fraud, misrepresentation or misconduct of an adverse party.

The plaintiffs' papers in support of this motion are several hundred pages in length supported by about a thousand pages in exhibits. We cannot find any rationale for such voluminous papers except a possible belief by the plaintiffs that the court could not possibly find time to read through all of them, which would necessitate a delay in ruling on the defendants' earlier motion because the plaintiffs' papers contain opposition to that motion, as well.[24]

Plaintiffs' motion attempts to reargue for the third time all of the previous discovery and substantive rulings adverse to plaintiffs, as well as their request for a new trial which had already been made and denied by decision dated May 16, 1991. One has to wonder what was the true motive for such a bizarre motion. The plaintiffs claim they have documentary evidence

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[24] One of the more interesting parts of plaintiffs' papers is on page 17 of Affirmation C. Although the page number is neatly typed at the bottom, the page is otherwise blank.

demonstrating the fraud, perjury and chicanery of opposing counsel which constitutes fraud under Rule 60(b)(3). They do cite to many documents but these documents are mostly their own earlier affidavits and memorandum of law. (The plaintiffs' arguments do not improve by repetition.) Their view of any factual dispute has been, all along, that their claims are to be acknowledged without dispute and the contrary evidence of the defendants is to be rejected as fraud and perjury. When matters reach this state, there is no alternative except to have the credibility of the parties tested at a trial. We had such a trial and the Sassowers' case was found by the jury to be wanting. We have reviewed the evidence and have already held that the jury verdict was not contrary to the weight of the evidence.

The plaintiffs attempt to prove misconduct by the opposing attorneys by citing to a footnote in this court's memorandum decision, dated October 11, 1990, in which we stated:

> The behavior of the attorneys and the parties to this action are unprecedented and, when the case is concluded, some action should be taken with respect thereto.

What plaintiffs fail to observe is that the footnote is appended to a description of plaintiffs' own earlier obstructive tactics. Additionally, plaintiffs' claim that they have been deprived of property of a substantial value because of the failure of the defendants to sign the original of their deposition transcripts and return them to the plaintiffs. This has no relevance under Rule 60(b)(3). In any case, the rules quite clearly state the manner in which such a failing can be overcome. A signed original deposition transcript is not essential to the trial of an action. Moreover, we find the argument somewhat specious in light of a letter sent to us by the court reporter who produced these transcripts, complaining that the Sassowers had not paid her.

Plaintiffs demand disciplinary sanctions to uphold the dignity of the court against all of the various defense attorneys involved in this case pursuant to Rule 4(f) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York. We do not see that rule as providing any rights to the plaintiffs whatsoever. If any attorney were to be

subjected to that rule, it would be Doris Sassower, but since she has been suspended from the practice of law in this state that might be an act of supererogation.

As a final matter, we note that on June 17, 1991, the plaintiffs filed a notice of appeal from the judgment in this case and the decision denying plaintiffs' motion for recusal and a new trial, as well as the denial of reargument thereof. To date, the plaintiffs have not ordered the transcripts of the trial. We perceive the possibility that plaintiffs may be intending to appeal on the basis of the papers contained in their lengthy motions which would result in the Court of Appeals not having the papers opposing the motions nor having the trial transcript. Should that be the plaintiffs' intent, it can be dealt with appropriately at a subsequent time.

CONCLUSION

Attorneys' fees and sanctions are awarded to the defendants to be paid by the named plaintiffs and attorneys as described. Plaintiffs' motion is in all respects denied.

SO ORDERED

Dated: White Plains, N.Y.
August 12, 1991

GERARD L. GOETTEL
U.S.D.J.

CASES CITED IN PLAINTIFFS' PETITION FOR REHEARING AND SUGGESTION FOR RE HEARING EN BANC WITH WHICH THE SECOND CIRCUIT'S OPINION CONFLICTS

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Business Guides v. Chromatic Comm., 498 U.S. ____ (1991)
Chambers v. Nasco, Inc., 111 S.Ct. 2123 (1991)
Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978)
Hensley v. Eckerhart, 461 U.S. 424 (1983)
Hall v. Cole, 412 U.S. 1 (1973)
Hazel-Altas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)
Roadway Express Inc. v. Piper, 447 U.S. 752 (1980)
United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949)

SECOND CIRCUIT CASES:

Brocklesby Transport v. Eastern States Escort, 904 F.2d 131 (2nd Cir. 1990)
Browning Debenture Holders' Committee v. Dasa Corp., 560 F.2d 1078 (2nd Cir. 1977)
Dow Chemical Pacific Ltd. v. Rascator Maritime S.A., 782 F.2d 329 (2nd Cir. 1986)
I. Meyer Pincus & Assoc. v. Oppenheimer & Co., 936 F.2d 759 (2nd Cir. 1991)
Faraci v. Hickey-Freeman Co., 607 F.2d 1025 (2nd Cir. 1979)
Greenberg v. Hilton International Co., 870 F.2d 926 (2nd Cir. 1989)
Leber-Krebs, Inc. v. Capitol Records, 779 F.2d 895 (2nd Cir. 1985)
McMahon v. Shearson/American Express, Inc., 896 F.2d 17 (2nd Cir. 1990)
New York Ass'n. for Retarded Children v. Carey, 711 F.2d 1136 (2nd Cir. 1983)
Oliveri v. Thompson, 803 F.2d 1265 (2nd Cir. 1986)
Sanko S.S. Co., Ltd. v. Galin, 835 F.2d 51 (2nd Cir. 1987);
United States v. International Brotherhood of Teamsters, 948 F.2d 1338 (2nd Cir. 1991).

TAKEN FROM SEPTEMBER 22, 1988 REPLY AFFIDAVIT OF DORIS L. SASSOWER IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION:

AT PAGE 9:

...to permit Defendants (and the Court) a more balanced evaluation of past actions and circumstances, I offer a copy of my biographic data taken from the 1988 Edition of Martindale-Hubbell's Law Directory. That publication, incidentally, gives me its hightest rating of an "AV" as to my credit-worthiness and competence [I also annex]... a copy of a certificate from Andrew O'Rourke [Westchester County Executive] dated June 20, 1986, expressing his appreciation to me for my service to the County of Westchester (Exhibit "D").

EXHIBIT "D" THERETO:

...

DORIS L. SASSOWER, born New York, N.Y., September 25, 1932; admitted to bar, 1955, New York; 1961, U.S. Supreme Court, U.S. Claims Court, U.S. Court of Military Appeals and U.S. Court of International Trade. *Education:* Brooklyn College (B.A., summa cum laude, 1954); New York University (J.D., cum laude, 1955). Phi Beta Kappa. Florence Allen Scholar. Law Assistant: U.S. Attorney's Office, Southern District of New York, 1954-1955; Chief Justice Arthur T. Vanderbilt, Supreme Court of New Jersey, 1956-1957. President, Phi Beta Kappa Alumnae of New York, 1970-71. President, New York Women's Bar Association, 1968-1969. President, Lawyers' Group of Brooklyn College Alumni Association, 1963-1965. Recipient: Distinguished Woman Award, Northwood Institute, Midland, Michigan, 1976. Special Award "for outstanding achievements on behalf of women and children," National Organization for Women--NYS, 1981; New York Women's Sports Association Award "as champion of equal rights," 1981. Distinguished Alumna Award, Brooklyn College, 1973. Named Outstanding Young Woman of America, State of New York, 1969. Nominated as candidate for New York State Court of Appeals, 1972. Columnist: ("Feminism and the Law") and Member, Editorial Board, Woman's Life Magazine, 1981. Author: Book Review, *Support Handbook, ABA Journal,* October, 1986;

Anatomy of a Settlement Agreement, Divorce Law Education Institute 1982; "Climax of a Custody Case," *Litigation*, Summer, 1982; "Finding a Divorce Lawyer you can Trust," *Scarsdale Inquirer*, May 20, 1982. "Is this Any Way to Run an Election?" *American Bar Association Journal*, August 1980; "The Disposable Parent: The Case for Joint Custody," Trial Magazine, April, 1980. "Marriages in Turmoil: The Lawyer as Doctor," Journal of Psychiatry and Law, Fall, 1979. "Custody's Last Stand," Trial Magazine, September, 1979; "Sex Discrimination-How to Know It When You See It," *American Bar Association Section of Individual Rights and Responsibilities Newsletter*, Summer, 1976; "Sex Discrimination and The Law," *NY Women's Week*, November 8, 1976; "Women, Power and the Law," *American Bar Association Journal*, May 1976; "The Chief Justice Wore a Red Dress," *Woman in the Year 2000*, Arbor House, 1974; "Women and the Judiciary: Undoing the Law of the Creator, *Judicature*, February 1974; "Prostitution Review," *Juris Doctor*, February,, 1974; "'No-Fault' Divorce and Women's Property Rights," *New York State Bar Journal*, November, 1973; "Marital Bliss: Till Divorce Do Us Part," *Juris Doctor*, April, 1973; "Women's Rights in Higher Education," *Current*, November 1972; "Women and the Law: The Unfinished Revolution," *Human Rights*, Fall 1972; "Matrimonial Law Reform: Equal Property Rights for Women," *New York State Bar*American Bar Association Journal, April, 1971; "The Role of Lawyers in Women's *Journal*, October 1972; "Judicial Selection Panels: An Exercise in Futility?" *New York Law Journal*, October 22, 1971; "Women in the Law: The Second Hundred Years," *American Bar Association Journal*, April 1971; The Role of Lawyers in Women's Liberation," *New York Law Journal*, December 30, 1970; "The Legal Rights of Professional Women," **Contemporary Education*, February, 1972; "Women and the Legal Profession," *Student Lawyer Journal*, November, 1970; "Women in the Professions," *Women's Role in* Contemporary Society, 1972; "The Legal Profession and Women's Rights," *Rutgers Law Review*, Fall, 1970; "What's Wrong With Women Lawyers?", Trial Magazine, October-November 1968. Address to: The National Conference of Bar Presidents, Congressional Record, Vol. 115, No. 24 E 815-6, February 5, 1969; The New York Women's Bar Association,

Congressional Record, Vol. 114, No. E5267-8, June 11, 1968. Director: New York University Law Alumni Association, 1974; International Institute of Women Studies, 1971; Institute on Women's Wrongs; 1973; Executive Woman, 1973. Co-organizer, National Conference of Professional and Academic Women, 1970. Founder and Special Consultant, Professional Women's Caucus, 1970. Trustee, Supreme Court Library, White Plains, New York, by appointment of Governor Carey, 1977-1986 (Chair, 1982-1986). Elected Delegate, White House Conference on Small Business, 1986. Member, Panel of Arbitrators, American Arbitration Association. *Member:* The Association of Trial Lawyers of America; The Association of the Bar of the City of New York; Westchester County, New York State (Member: Judicial Selection Committee; Legislative Committee, Family Law Section), Federal and American (ABA Chair, National Conference of Lawyers and Social Workers, 1973-1974; Member, Sections on: Family Law; Individual Rights and Responsibilities Committee on Rights of Women, 1982; Litigation) Bar Associations; New York State Trial Lawyers Association; American Judicature Society; National Association of Women Laywers (Official Observer to the U.N., 1969-1970); Consular Law Society; Roscoe Pound-American Trial Lawyers' Foundation; American Association for the International Commission of Jurists; Association of Feminist Consultants; Westchester Association of Women Business Owners; American Womens' Economic Development Corp.; Womens' Forum. Fellow: American Academy of Matrimonial Lawyers; New York Bar Foundation.

Supreme Court, U.S.
FILED
MAR 24 1993
OFFICE OF THE CLERK

No. 92-1405

In the Supreme Court of the United States

OCTOBER TERM, 1992

ELENA RUTH SASSOWER and DORIS L. SASSOWER,

Petitioners,

v.

KATHERINE M. FIELD, CURT HAEDKE, LILLY HOBBY, WILLIAM IOLONARDI, JOANNE IOLONARDI, ROBERT RIFKIN, individually, and as Members of the Board of Directors of 16 Lake Street Owners, Inc., HALE APARTMENTS, DESISTO MANAGEMENT, INC., 16 LAKE STREET OWNERS, INC., ROGER ESPOSITO, individually, and as an officer of 16 Lake Street Owners, Inc.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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RESPONDENTS' BRIEF IN OPPOSITION

QUESTION PRESENTED

Did the Court of Appeals properly sustain the imposition of attorneys' fees by the District Court as a sanction pursuant to the inherent power of the District Court to sanction Petitioners for their extraordinary, vexatious and oppressive conduct during the course of the litigation?

TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of the Case 1

Underlying Matter 1

District Court Proceedings 1

Sanctions Imposed by the District Court 4

Court of Appeals Proceedings 7

Reasons for Denying the Petition for a Writ of Certiorari 8

Summary of Argument 9

Argument 10

Point I:

THE COURT OF APPEALS PROPERLY SUSTAINED THE IMPOSITION OF ATTORNEYS' FEES BY THE DISTRICT COURT AS A SANCTION PURSUANT TO THE INHERENT POWER OF THE DISTRICT COURT TO SANCTION PETITIONERS FOR THEIR EXTRAORDINARY, VEXATIOUS AND OPPRESSIVE CONDUCT DURING THE COURSE OF THE LITIGATION 10

Conclusion 14

TABLE OF AUTHORITIES

Page

Cases Cited:

Matter of Case, 937 F.2d 1014 (5th Cir. 1991) 8

Chambers v. NASCO, Inc., 111 S.Ct. 2123 (1991) 8, 9, 10, 11, 12, 13

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Sassower v. Field, 752 F. Supp 1190 (S.D.N.Y. 1990) 2

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Statutes Cited:

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Federal Fair Housing Act, 42 U.S.C. §§ 3601-3631 ..... 1, 4, 5, 7, 8, 13

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TABLE OF AUTHORITIES

Page

Statutes Cited:

Federal Rules of Civil Procedure, Rule 60(b)(3) 4, 5, 6, 7, 8, 13

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New York Human Rights Law, N.Y. Exec. Law § 296(5)(a) 1

Supreme Court Rules 10.1(a) and 10.1(c) 9

28 U.S.C. § 1927 (1988) 4, 6, 7, 12, 13

STATEMENT OF THE CASE

This Petition seeks review of the decision by the Court of Appeals for the Second Circuit which sustained the imposition of attorneys' fees by the District Court as a sanction pursuant to the inherent power of the District Court to sanction petitioners for their extraordinary, vexatious and oppressive conduct during the course of the litigation. The issues emanating from this Petition do not involve the Fair Housing Act or the Civil Rights Act, but these issues do involve the ability of the court to impose sanctions for conduct which abuses the judicial process.

Underlying Matter

The underlying action arose from the refusal of the board of directors of a cooperative housing corporation to approve the sale of an apartment owned by John McFadden ("McFadden") to Elena Ruth Sassower ("Elena"), Doris L. Sassower ("Doris"), and Joseph Karmel.[1]

District Court Proceedings

In August 1988, following the disapproval of the sale, Elena, Doris and McFadden, filed suit in the District Court for the Southern District of New York alleging violations of the Federal Fair Housing Act, 42 U.S.C. §§ 3601-3631; the Federal Civil Rights Act, 42 U.S.C. § 1983; New York Human Rights Law, N.Y. Exec. Law § 296(5)(a); New York Civil Rights Law, N.Y. Civ. Rights Law § 19-a; and other state law

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[1] Joseph Karmel, the son-in-law of Doris L. Sassower, had not been named as a party to the action.

claims. Defendants included the cooperative housing corporation and the individually named members of its board of directors (hereinafter collectively referred to as "the Co-Op"), the Co-Op's managing agent (DeSisto Management, Inc., hereinafter referred to as "DeSisto"), the Co-Op's attorney and the former attorney for McFadden (Roger Esposito, hereinafter referred to as "Esposito"), and the former owner of the Co-Op's building and sponsor of the plan which converted the building from rental to cooperative ownership (Hale Apartments, hereinafter referred to as "Hale"). The plaintiffs alleged that the defendants discriminated against them by rejecting the purchase application on the basis of the status of Elena and Doris as single, Jewish women.

In May 1990 McFadden, who, according to his current counsel, was coerced by Elena and Doris to join as plaintiff (CA-46, n. 20),[2] moved to be allowed to withdraw from the action. McFadden's motion was granted on June 14, 1990 and McFadden was dropped as a party to the action and his claims against the defendants were discontinued. On August 17, 1990 Elena and Doris filed an amended complaint.

Following the completion of extensive, costly and frequently abusive discovery conducted by Elena and Doris, the District Court granted summary judgment in favor of Hale and DeSisto on September 5, 1990, see *Sassower v. Field*, 752 F.Supp. 1182 (S.D.N.Y. 1990), and Esposito on November 13, 1990, see *Sassower v. Field*, 752 F.Supp. 1190 (S.D.N.Y. 1990). The court concluded that there was no issue of fact

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2 "CA-" stands for the "Certiorari Appendix", which is annexed to the Petition herein.

concerning Hale, DeSisto or Esposito since none of them were involved in the decision making process which resulted in the disapproval of the purchase application. However, the District Court denied the Co-Op's motion for summary judgment because there were factual issues concerning the reasons for the disapproval of the purchase application which could only be resolved by a jury.

On March 19, 1991, after a seven day jury trial, a jury verdict in favor of the Co-Op was rendered. The jury answered specific interrogatories, rejecting all of the plaintiffs' claims,[3] including the claim that the religion, gender, or marital status of Elena and Doris was a reason for the rejection of their application to purchase the apartment. On March 22, 1991 judgment was entered formally dismissing the amended complaint against all the defendants.

On April 5, 1991 the plaintiffs filed a motion in the District Court for recusal and a new trial. This motion was denied on May 16, 1991. On June 4, 1991 plaintiffs filed another motion in the District Court for reargument of their prior motion for recusal and a new trial. The District Court refused to entertain this second motion since it consisted of reargruments of prior applications which had already been reargued.

Thereafter, the plaintiffs filed a notice of appeal dated June 17, 1991 which covered the judgment dismissing their complaint, the orders of the District Court denying their motions for recusal and a new

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[3] As used hereinafter, the word "plaintiffs" refers only to Elena Ruth Sassower and Doris L. Sassower.

trial and reargument thereof, and each and every part of the judgment, including all intermediate and post-judgment orders of the District Court. This appeal[4] was dismissed on August 27, 1991 as a result of the plaintiffs' failure to comply with the requirements of a previously entered scheduling order.[5]

Sanctions Imposed by the District Court

After entry of judgment dismissing the amended complaint, each of the defendants made a separate written motion for attorneys' fees, costs and sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, the Federal Fair Housing Act, 42 U.S.C. § 3613(c), and 28 U.S.C. § 1927. Several months later the plaintiffs filed a lengthy motion for sanctions and attorneys' fees against the defendants, defendants' counsel, and State Farm Insurance Company,[6] and for a new trial under Fed. R. Civ. P. 60(b)(3). It is interesting to note that among the grounds set forth by plaintiffs as authority for the imposition of sanctions and attorneys' fees against the defendants is *"the*

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4 U.S. Court of Appeals Docket No. 91-7601.

5 This was the third notice of appeal filed by the plaintiffs in connection with the underlying action. The plaintiffs had previously filed two improper interlocutory appeals which had been subsequently withdrawn.

6 State Farm Fire and Casualty Company has provided a defense for each of the defendants, except defendant Hale Apartments. Hale Apartments is not covered by insurance and has been and still is paying for its own legal costs and expenses out of its own pocket.

inherent powers of this Court". [7] In support of this motion and in opposition to the motions made by each of the defendants which were still pending, plaintiffs submitted five separate affirmations, a supplemental memorandum of law which supplemented an opposing memorandum of law previously filed, and three separate compendia of exhibits.

On August 12, 1991 the District Court granted the defendants' respective motions for attorneys' fees and costs as prevailing parties pursuant to the Fair Housing Act, 42 U.S.C. § 3613(c)(2) (1988) (CA-28-55). [8] The defendants were awarded a total of $92,000 for attorneys' fees and $1,350 for costs. These amounts represented only a portion of the actual fees and costs incurred by the defendants in connection with the defense of this lawsuit.[9]

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7 Plaintiffs' notice of motion for sanctions, counsel fees and for a new trial under Fed. R. Civ. P. 60, dated July 1, 1991.

8 *Sassower v. Field*, 138 F.R.D. 369 (S.D.N.Y. 1991).

9 In August 1988, when the original complaint in this case was filed, the Fair Housing Act authorized an award of attorney's fees only to a prevailing plaintiff. However, on September 13, 1988, the act was amended to authorize attorney's fees and costs to a prevailing party. 42 U.S.C. § 3613(c)(2) (1988). The District Court chose to award only those fees and costs incurred after March 10, 1989, the effective date of the amendment. The Court of Appeals subsequently recognized that the selection of this date as a starting point for fees and costs operated "as a fortuitous benefit for the plaintiffs" (CA-18).

In the alternative the Court imposed sanctions against the plaintiffs totaling $92,000 pursuant to Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927 (1988), and, as a further alternative, pursuant to the Court's inherent power "because of their tactics of delay, oppression and harassment" (CA-9).

In addition, Eli Vigliano, the former attorney of Doris, was sanctioned $1,500 pursuant to 28 U.S.C. § 1927 for his shocking and abusive conduct during the deposition of two of the defendants (CA-44-45, 52). McFadden and his attorney, who were found to be in violation of Rule 11 with respect to their suing DeSisto and Esposito, were assessed Rule 11 sanctions, jointly and severally, in the amount of $3,000 to be paid to DeSisto and $3,000 to be paid to Esposito (CA-46-50, 53).[10]

Finally, the Court denied in its entirety the plaintiffs' motion for sanctions, attorneys' fees and a new trial under Fed. R. Civ. P. 60(b)(3). The Court observed:

> Plaintiffs' motion attempts to reargue for the third time all of the previous discovery and substantive rulings adverse to plaintiffs, as well as their request for a new trial which had already been made and denied by decision dated May 16, 1991. * * * * The plaintiffs claim they have documentary evidence demonstrat-

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[10] By memorandum decision dated September 24, 1991, the District Court modified its order sanctioning McFadden and his attorney by relieving McFadden's attorney from his obligation to pay monetary sanctions and by reducing in half the sanctions payable by McFadden.

ing the fraud, perjury and chicanery of opposing counsel which constitutes fraud under Rule 60(b)(3). They do cite to many documents but these documents are mostly their own earlier affidavits and memorandum of law. (The plaintiffs' arguments do not improve by repetition.) * * * * (CA-53-54)

Court of Appeals Proceedings

Following the entry of the supplemental judgment which imposed sanctions upon the plaintiffs and denied plaintiffs' motion for sanctions, attorneys' fees and a new trial, the plaintiffs filed a notice of appeal dated September 12, 1991 which was limited to the supplemental judgment.[11]

Upon review (CA-6-19),[12] the Court of Appeals found that the sanctions imposed by the District Court could not be awarded under the Fair Housing Act (CA-12-14). However, the Court of Appeals went on to hold that the sanctions awarded under Rule 11 of the Federal Rules of Civil Procedure (CA-14) and the sanctions awarded under 28 U.S.C. § 1927 (CA-14-16),[13] were each equally supportable by the exercise of the District Court's inherent authority (CA-16-17).

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11 U.S. Court of Appeals Docket No. 91-7891.

12 *Sassower v. Field*, 973 F.2d 75 (2nd Cir. 1992).

13 The Court of Appeals held that although 28 U.S.C. § 1927 will not support sanctions against Elena Ruth Sassower, it is available for use against Doris L. Sassower (CA-16).

The Court of Appeals recognized that the central issue before it did not concern the Fair Housing Act, but it did concern the manner in which the plaintiffs conducted the litigation (CA-14). In resolving this issue the Court of Appeals held that the District Court was "abundantly justified in imposing sanctions against both plaintiffs and that the amount imposed upon Doris was fairly determined, but that the amount of the sanction imposed on Elena must be reconsidered in light of her limited financial resources" (CA-8).

The Court of Appeals also upheld the denial of the plaintiffs' motion for sanctions, attorneys' fees and a new trial under Rule 60(b)(3). The Court of Appeals observed that "[i]n the main, the motion is nothing more than a reargument of numerous claims made prior to and during the trial, including factual issues resolved against the plaintiffs by the jury" (CA-18).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

The issue presented by the instant petition was recently decided by the Supreme Court in *Chambers v. NASCO, Inc.*, 111 S.Ct. 2123 (1991). The holding in *Chambers*, that a district court may properly invoke its inherent power in assessing attorneys' fees as a sanction for oppressive, vexatious and bad-faith conduct, is clear and unequivocal. Besides the Second Circuit, other Courts of Appeals have been following *Chambers* in upholding sanctions for bad-faith conduct. *See, e.g., Western Systems v. Ulloa*, 958 F.2d 864 (9th Cir. 1992); *Matter of Case*, 937 F.2d 1014 (5th Cir. 1991).

Moreover, the petitioners have failed to show any of the reasons set forth in Supreme Court Rules 10.1(a) and 10.1(c) which justify the granting of this petition. There is no conflict between the Courts of Appeals or any other basis for further review by this Court.

SUMMARY OF ARGUMENT

The petitioners' conduct during the course of the litigation was extraordinary, vexatious and oppressive. Consequently, the District Court was abundantly justified in imposing sanctions for such conduct and the Court of Appeals properly upheld the District Court's imposition of sanctions pursuant to its inherent power. *Chambers v. Nasco, Inc., supra.*

ARGUMENT

POINT I

THE COURT OF APPEALS PROPERLY SUSTAINED THE IMPOSITION OF ATTORNEYS' FEES BY THE DISTRICT COURT AS A SANCTION PURSUANT TO THE INHERENT POWER OF THE DISTRICT COURT TO SANCTION PETITIONERS FOR THEIR EXTRAORDINARY, VEXATIOUS AND OPPRESSIVE CONDUCT DURING THE COURSE OF THE LITIGATION.

This Court has made it abundantly clear that a district court has the inherent authority to sanction parties appearing before it for acting in bad-faith, vexatiously, wantonly, or for oppressive reasons. *Chambers, supra,* at 2133.

In the case at bar, the District Court ruled that the plaintiffs managed the proceedings "in a fashion that vexatiously, wantonly and for oppressive reasons, increased the legal fees enormously" (CA-37). A similar observation was made by the Magistrate Judge when he found that Doris Sassower demonstrated an "egregious failure to make discovery as directed by the court" (CA-39). The Court also observed that the plaintiffs made several unsupported bias recusal motions (CA-37) and they continually made personal attacks on opposing parties and counsel[14] (CA-37). The Court opined that the

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14 In this regard, the Court went so far as to quote from Doris Sassower's deposition transcript to demonstrate her vexatious conduct during the proceeding (CA-37).

BEST AVAIL

plaintiffs' "view of any factual dispute has been, all along, that their claims are to be acknowledged without dispute and the contrary evidence of the defendants is to be rejected as fraud and perjury" (CA-54).

Moreover, the District Court further observed that the plaintiffs routinely made motions to reargue all rulings which were adverse to them, filed two improper interlocutory appeals and attempted to "communicate directly with the defendants rather than through counsel in order to force through their settlement demands" (CA-37-38).

The Court of Appeals, after thoroughly reviewing the record of the proceedings before the District Court, held that the District Court was "abundantly justified in imposing sanctions against both plaintiffs" (CA-8). The Court of Appeals specifically agreed with the assessment of the District Court that "The Sassowers pursued this litigation as if it was a holy war and not a court proceeding. . ." (CA-10).

The plaintiffs' conduct during the course of the district court proceedings justified the imposition of attorneys' fees as sanctions under *Chambers*. This conclusion was reached by both the District Court (CA-46, 51) and the Court of Appeals (CA-17). In *Chambers*, this Court held that the district court "properly invoked its inherent power in assessing as a sanction for a party's bad-faith conduct attorneys' fees and related expenses paid by the party's opponent to its attorneys." *Id.*, at 2128. After pointing out the difficulty in applying the express statutory sanctioning provisions, the Court recognized that:

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> In circumstances * * * in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct, would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the rules themselves. (Citations omitted).

Id., at 2136.

In this case, the Court of Appeals adopted the same reasoning used in *Chambers*, when it held that the awards under Rule 11 and 28 U.S.C. § 1927 were equally supportable by the exercise of the District Court's inherent authority.

It should also be noted that the concerns expressed by the dissenting opinions in *Chambers* are not applicable to the facts in this case.

Justice Scalia, in his dissenting opinion, recognized the right of the district court to use its inherent power to impose sanctions. However, he disagreed with the majority's extension of this right to reach conduct beyond the confines of the litigation before the district court. In this case, all of the sanctioned conduct was within the confines of the litigation. Therefore, Justice Scalia's concern would be inapplicable to this case.

Justice Kennedy, in his dissenting opinion, recognized that the district court has the right to use its inherent power to impose sanctions for bad-faith

conduct, provided there is no rule or statutory basis for the imposition of sanctions and that the sanctions are not imposed for pre-litigation conduct. Unlike the district court in *Chambers*, the district court here used express sanctioning provisions provided by Congress. However, the Court of Appeals upon review found that attorneys' fees could not be awarded under the Fair Housing Act, 42 U.S.C. § 3613, and the sanctions awarded under Rule 11 and 28 U.S.C. § 1927 were equally supportable by the exercise of the district court's inherent authority.

Finally, there is absolutely no merit to plaintiffs' unsubstantiated allegations of lack of due process. The plaintiffs had clear and timely notice that attorneys' fees, costs and sanctions for their extraordinary, vexatious and oppressive conduct were being sought. The sanctions imposed were the result of fully litigated motions on notice made by the defendants concerning the manner in which the plaintiffs conducted the litigation. The plaintiffs were afforded the opportunity to submit opposing affidavits, supporting exhibits and briefs. In fact, the plaintiffs not only availed themselves of this opportunity, they also moved for sanctions against the defendants and for relief under Fed. R. Civ. P. 60(b)(3) (CA-18; CA-53). In addition, all sanctioned conduct was within the proceedings of the District Court. Consequently, the necessary facts upon which the sanctions award was predicated were part of the District Court record, thus obviating the need for a hearing.

In conclusion, the Court of Appeals properly sustained the imposition of attorneys' fees as a sanction pursuant to the District Court's inherent power.

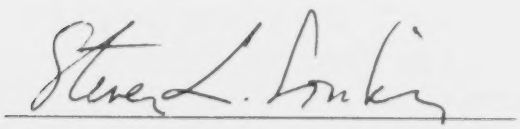
CONCLUSION

For the reasons set forth above, the respondents herein submit that a Writ of Certiorari should be denied in this case.

Dated: New York, New York
March 22, 1993

Respectfully submitted,

MARSHALL, CONWAY & WRIGHT, P.C.



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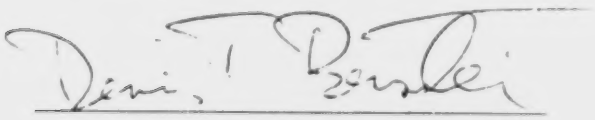

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Supreme Court, U.S.
APR 13 1993

No. 92-1405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ELENA RUTH SASSOWER and DORIS L. SASSOWER,

Petitioners,

v.

KATHERINE M. FIELD, CURT HAEDKE, LILLY HOBBY, WILLIAM IOLONARDI, JOANNE IOLONARDI, ROBERT RIFKIN, individually, and as Members of the Board of Directors of 16 Lake Street Owners, Inc., HALE APARTMENTS, DeSISTO MANAGEMENT, INC., 16 LAKE STREET OWNERS, INC., ROGER ESPOSITO, individually, and as an officer of 16 Lake Street Owners, Inc.

Respondents,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Respondents Have Failed To Meet The Issues Or To Controvert The Essential Facts Establishing Such Issues.....1

Respondents Do Not Deny That The Award Under Inherent PowerMasksSubstantiveFee-Shifting.....5

Respondents Have Not Shown Compliance With Due Process.....5

Respondents Do Not Deny That Equitable Considerations Bar Their Sanction Award Under Inherent Power.....7

A. *Respondents Do Not Deny That The Sanctions Award Constitutes "Unjust Enrichment" And A "Windfall" To The Insured Defendants*.....7

B. *Respondents Do Not Deny That Their Uncontroverted Litigation Misconduct Constitutes "Unclean Hands" Disentitling Them To Sanctions And Entitling Petitioners To Affirmative Relief*.....8

This Case Mandates Exercise Of The Court's Power Of Supervision.....9

Conclusion.....10

Supplemental Appendix:

Excerpt from Petition for Rehearing and Suggestion for Rehearing En Banc, filed August 27, 1992 (pp. 10-11)

Respondents Have Failed To Meet The Issues Or To Controvert The Essential Facts Establishing Such Issues

Respondents' Opposing Brief is more significant for what it does not say than what it does. Respondents do not address any of the four "Questions Presented" by the Petition. Nor do they dispute Petitioners' showing that Chambers v. Nasco, 111 S. Ct. 2123 (1991)--the only authority on which the Second Circuit relied--is legally and factually inapplicable.

Respondents have not rebutted Petitioners' legally-supported arguments that Chambers, unlike the case at bar:

> (a) did not involve a case brought under a federal fee-shifting statute, such as the Fair Housing Act, and, therefore, did not raise the question of congressional preemption of inherent sanctioning power [Question #1, Point I];
>
> (b) did not involve inherent power being used as a back-up to sustain a district court's otherwise unsustainable sanction awards under Rule 11 and §1927 [Question #2, Point II]
>
> (c) did not involve a due process challenge to inherent power in the lower courts, including denial of the right to a hearing and entitlement to a jury trial [Question #3, Point III];
>
> (d) did not involve equitable considerations of "unjust enrichment" and "unclean hands", precluding a fee-shifting award under equitable inherent power [Question #4, Points IV and V].

Nor have Respondents addressed Petitioners' "Reasons for Granting the Writ" (Pet., at 14-16), articulating the compelling constitutional and public policy considerations warranting review by this Court--reasons far transcending the parties to this litigation.

Respondents do not dispute that the Second Circuit's decision uses a "standardless" inherent power to override and nullify congressional intent and the constitutional balance of powers, as reflected in text-based statutes and rules. The fact that the Second Circuit rests on Chambers--without the slightest discussion of its applicability to the instant case--and that Respondents, likewise, have not come forth with any facts bringing this case within Chambers' defined parameters shows that Chambers is being interpreted to permit broad expansion of inherent power far beyond the narrow and extreme circumstances of that case. Such application of Chambers, if allowed to stand, permits lower federal courts, in one fell swoop, to undo the work of a democratically-elected Congress, as well as a duly-appointed Judicial Conference--and to do so, even without passing respect to bedrock due process principles.

This case presents the perfect vehicle for this Court's vitally-needed clarification of Chambers--a need further borne out by a second case wherein certiorari is being sought, Pacific Legal Foundation v. Paul Kayfetz, et al., now pending before this Court under docket number 92-1544. In Pacific Legal, the Ninth Circuit relied on Chambers to disregard available statutory and rule sanctioning provisions and, in the absence of "necessity", used inherent power to sanction a non-party, public interest foundation. In the instant case, the Second Circuit similarly departed from "the rule of necessity" in its use of inherent power--failing even to identify *any* instance of sanctionable conduct by Petitioners which would require inherent power to address. Such fact, evident from the very face of the Second Circuit's decision, is undisputed by Respondents--who, likewise, fail in their Opposing Brief to show *any* conduct by Petitioners outside the reach of available sanctioning provisions.

A reading of the decisions in Pacific Legal and this case suggests that inherent power is not being used to punish otherwise unpunishable conduct, but rather is being employed to target those who the lower courts desire to make the object of sanctions. Taken separately and together, these two cases display the ease with which inherent power becomes a sword to selectively and invidiously punish persons or entities associated with causes to which the court is unsympathetic, if not hostile, rather than a shield to protect the integrity of the court.

Thus is graphically illustrated the precise situation forecast in Justice Kennedy's eloquent dissent to Chambers, in which Chief Justice Rehnquist and Justice Souter joined:

> "But the same unchecked power also can be applied to chill the advocacy of litigants attempting to vindicate all other important federal rights." supra, at 2145.

As stated in Petitioners' pending motion to have the case at bar considered with Pacific Legal, both cases, taken together, represent the gamut of private enforcement of federal rights: by private individuals, as in the instant case, and by public interest groups, as in Pacific Legal. In each case, the plaintiffs were acting as "private attorney-generals", seeking to further declared national policy, as expressed in congressional enactments. The inevitable effect of the Second Circuit and Ninth Circuit decisions for which review is sought is to discourage private parties from bringing civil rights and other public interest litigation.

The significance of Justice Kennedy's concern as to the potentially "chilling effect" of Chambers was recognized by the majority of this Court which, nonetheless, believed that the risk was minimal because the subjective "bad-faith" component was "difficult to establish" (supra, at 2134, fn. 11). As an additional safeguard, the majority observed that due process mandates would "of course" have to be met in making a "bad-faith" finding, as well as in the assessment of fees (supra, at 2136).

Yet, both the instant case and Pacific Legal bear out the legitimacy of Justice Kennedy's fear that the predicate "bad-faith" finding would, without greater definition, become nothing more than a "talismanic recitation of the phrase"[1]. Thus, in the case at bar, there is not a shred of evidence in the record to support the "talismanic recitation" of "bad-faith" by the District Court (CA-38), thereafter adopted in the

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[1] See also 105 Harvard Law Review 357 (1991), noting in its discussion of Chambers that "the due process requirement of a finding of 'bad faith' is poorly defined at present...".

most cursory fashion by the Second Circuit (CA-17)--without the slightest concern for the palpable lack of due process underlying such "recitation"[2]. Indeed, the utter irrelevance of "bad faith" to the Second Circuit's invocation of inherent power is highlighted by the cavalier manner in which the Second Circuit transposed the $50,000 Rule 11 award--as to which the District Court had failed to identify a single offending document--into a $50,000 award under inherent power, albeit Rule 11 awards do not require "bad faith"[3] (CA-14, 16-17). Likewise, the Second Circuit simply ignored the fact that there was no finding of "bad-faith" against non-lawyer Elena Sassower--let alone any identification of sanctionable conduct by her--when it converted an undefined portion of the $42,000 sanction imposed against her by the District Court under §1927 into one under inherent power (CA-14-17) (Pet., at 20-21).

The foregoing exercise of inherent power against Petitioners must be seen in the context of a case which the Second Circuit expressly found not to be "meritless" when it rejected the District Court's fee award under the Fair Housing Act (CA-13-14). Indeed, the Second Circuit went even further by explicitly ruling that there was no finding that Petitioners' case had been brought or maintained in bad-faith. As a consequence, any sanctionable conduct by Petitioners had to be

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[2] Exemplifying the deprivation of due process by the District Court is its incorporation of a substantial segment of its April 19, 1990 memorandum decision (CA-39-40), which was not the end-product of any due process procedure--the magistrate having sua sponte issued a false and defamatory decision against Doris Sassower, affording her no prior notice or opportunity to be heard as to her documented medical condition. On its face, the incorporated memorandum decision demonstrates the District Court's assumptions, speculations, prejudgments, and reliance on rank hearsay, including newspaper articles, as well as its summary rejection of Doris Sassower's request for a hearing on the allegations contained in the magistrate's report--all of which she vigorously denied. (see excerpt from the Petition for Rehearing, annexed hereto; also Br. 33-39)

[3] Notwithstanding that Rule 11 is judged by an objective standard, without regard to subjective intent, stringent standards of specificity and due process apply. In Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533 (1991), two evidentiary hearings were held by the magistrate, with a third thereafter held in a case involving a Rule 11 award of less than $14,000 assessed against a corporation.

determined with respect to the specific acts involved--not as a totality.

Respondents Do Not Deny That The Award Under Inherent Power Masks Substantive Fee-Shifting

As set forth in the Petition (at 16-19), the Second Circuit's internally inconsistent decision shows that what was actually achieved through inherent power was a sub silentio repudiation of the American Rule against fee-shifting and a judicial interference with the substantive social policy reflected in the fee-shifting statute involved, as limited by this Court's interpretation in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

Respondents totally ignore the irrefutable fact--documented by the very Judgment (CA-20) affirmed by the Second Circuit (CA-20)--that the fee-shifting sustained by the Second Circuit was actually the substantive fee-shifting of the Fair Housing Act--the various Respondents receiving the District Court's Fair Housing Act distributive allocations, rather than the differing amounts allotted them under its Rule 11 and §1927 awards (Pet., at 9, fn. 7, 19). Nor do Respondents challenge Petitioners' argument that once the Second Circuit vacated the District Court's Fair Housing Act awards, the Judgment based thereon became a nullity (Pet., at 19 fn. 14).

Respondents Have Not Shown Compliance With Due Process

Respondents' attempt to argue that the Second Circuit's decision is in keeping with the mandates of due process, recognized by Chambers, demonstrates that such mandates need to be more clearly defined[4]. Respondents' affirmative statement that: "...there is absolutely no merit to plaintiffs' unsubstantiated allegations of lack of due process" (at p.

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[4] The need for clarification of the due process aspects of inherent power is further evident from Western Systems v. Ulloa, 958 F.2d 864 (9th Cir. 1992) one of the two cases relying on Chambers, cited by Respondents in their Opposing Brief. In that case, the Ninth Circuit was compelled to remand a sanctions award made under inherent power because the district court did not hold an "appropriate hearing" and provide a "proper opportunity...to contest the questions of bad faith and the amount of the sanctions." supra, at 873. See also footnote 1 hereinabove.

13) is indefensible where: (a) Respondents admit that their motions for counsel fee/sanctions were not made under inherent power (at p. 4); (b) the Second Circuit's decision, on its face, fails to identify what is being sanctioned under inherent power; (c) Respondents admit that no hearing was afforded Petitioners[5].

Respondents do not deny that the monetary awards identified under Rule 11 and §1927 were *not* correlated by the District Court to any particular defense costs and were arbitrarily arrived at lump sums (CA-52-53), fixed in the identical aggregate amount as the equally arbitrary award under the Fair Housing Act (CA-50-52). As is obvious from the face of its decision, the Second Circuit adopted, without question, such completely arbitrary and uncorrelated sums (CA-14-18) for the award under inherent power.

Respondents have carefully framed their opposing arguments (at pp. 10-11) so as to repeat in haec verba the conclusory language of the District Court, adopted virtually verbatim by the Second Circuit's decision. Such artifice on their part is designed to avoid any direct statement by them as to what the factual record actually shows--as opposed to what the lower courts say that it shows[6].

Thus, for example, Respondents' reference to Petitioners' bias recusal motions is couched in the language of the Court's opinion as "unsupported" (p. 10). Yet, Respondents do not themselves assert that

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[5] Respondents' claim (at p. 13) that no hearing was necessary because "all sanctioned conduct was within the proceedings of the District Court" calls for an unequivocal statement by this Court that a hearing is required to determine "bad faith"--*irrespective* of whether or not the conduct takes place before the court.

[6] Respondents' conscious knowledge that the record does not support the lower court decisions may be assessed against the meticulous documentary presentation set forth in the first 40 pages of Petitioners' appellate brief to the Circuit Court, filed December 10, 1991, as well as in their Petition for Rehearing, filed August 27, 1992. For the convenience of the Court, an illustrative excerpt of the Petition for Rehearing is annexed hereto. A full copy of the Petition for Rehearing is already on file with this Court as Exhibit "C" to Petitioners' December 2, 1992 motion to extend their time to file their "Cert" Petition.

such motions were unsupported or that they were in any way untruthful or made in bad faith. And they do not address Petitioners' due process right to make bias recusal motions--without retaliation by way of sanctions under the court's inherent power (Pet., at 22).

Finally, Respondents have not denied that the sua sponte inclusion in the decisions of both the District Court and Second Circuit opinions of dehors-the-record false and defamatory material, based on unadulterated hearsay, was totally violative of due process and the Code of Judicial Conduct (Pet., at 8, 10-11, fn. 8).

Respondents Do Not Deny That Equitable Considerations Bar Their Sanction Award Under Inherent Power

A. Respondents Do Not Deny That The Sanctions Award Constitutes "Unjust Enrichment" And A "Windfall" To The Insured Defendants

Respondents do not address Petitioners' equitable arguments involving the insurance issue--an issue highlighted by Respondents' express admission that three of the four defense counsel were fully paid by State Farm Insurance Company[7] and that the insured defendants paid no legal expenses from their "own pocket" (fn. 6). Respondents thus concede Petitioners' contention that State Farm is the "real party in interest" for any claims based on reimbursement of attorneys' fees and expenses (Pet., at 25).

Respondents totally ignore--just as they did before the lower courts--the threshold issue raised by Petitioners from the outset that the sanction awards are jurisdictionally deficient under FRCP 17(a) and 19 (Pet., at 27).

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[7] With respect to defense counsel for Hale Apartments, who purports that it was "not covered by insurance", Petitioners were denied discovery on that issue. As shown by Petitioners' Rule 60(b)(3) motion (Aff. B), defense counsel for Hale Apartments repeatedly misrepresented and concealed throughout the discovery process material information concerning, inter alia, the corporate status of Hale Apartments. As a result, the District Court erroneously granted summary judgment to Hale Apartments based on a false premise that such entity was a corporation, whose "veil" could not be "pierced" to charge it with the acts and omissions of its board representative, defendant Robert Rifkin (Aff B: 5-8)

Most significantly, Respondents do not deny that following the Second Circuit's affirmance of the District Court's $100,000 sanction award, defense counsel refused to turn over to the insurer the monies ordered to be paid by Petitioners (Pet., 13; CA-30)[8]. Respondents thus confirm that they believe themselves entitled to the benefit of a "windfall" award--notwithstanding case law of this Court and the Second Circuit proscribing "windfall" awards.

B. ***Respondents Do Not Deny That Their Uncontroverted Litigation Misconduct Constitutes "Unclean Hands" Disentitling Them To Sanctions And Entitling Petitioners To Affirmative Relief***

The most "extraordinary" aspect of Respondents' Opposing Brief is its failure to deny Petitioners' numerous allegations of litigation misconduct, including fraud upon the court and Petitioners (Pet., at 4-6, 24-28). Nor have they denied the fact that Petitioners' fully-documented motion for sanctions and Rule 60(b)(3) relief was uncontroverted by Respondents (Pet., at 6, 25-28)[9].

Respondents themselves identify the fact that Petitioners supported such motion, which was also in opposition to Respondents' then pending counsel fee/sanction motions, with:

> "...five separate affirmations, a supporting memorandum of law, which supplemented...[a] memorandum of law previously filed, and three separate compendia of exhibits." (at p. 5)

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[8] Petitioners' motion to the Second Court to expand the appellate record so as to include this further proof that Respondents' fee applications were not made on behalf of the insurer as the "real party in interest" was summarily denied (Pet., at 13; CA-26). It may be noted that in Pacific Legal a similar motion was made to the Ninth Circuit to correct critical factual errors as to the relationship between Pacific Legal Foundation and the plaintiffs in that case, on which the Ninth Circuit's decision rested. The Ninth Circuit also rejected such motion (Petition of Pacific Legal, p. 6, at fn.1.)

[9] For that matter, Respondents have also not denied that Petitioners' timely-filed Objections to the closing of discovery were uncontroverted by them. (Pet., at 5)

Respondents do not deny Petitioners' statements as to the serious discovery misconduct committed by Respondents, which was wilful and on-going and included the deliberate destruction and suppression of evidence critical to proving Petitioners' discrimination case (Pet., at 4-5, 27-28).

Nor do Respondents deny that such misconduct as formed the basis of Petitioners' extensively documented Rule 60(b)(3) motion substantially interfered with and prejudiced Petitioners in proving their affirmative case (Pet., at 27-28).

Respondents' admission of "unclean hands" by reason of their failure to deny their litigation misconduct before the District Court, the Circuit Court, or in their Opposing Brief before this Court warrants summary reversal of the sanctions award in their favor, as well as summary reversal of the denial of Petitioners' Rule 60(b)(3)/sanctions motion.

This Case Mandates Exercise Of The Court's Power of Supervision

As set forth in the Petition (at 19, 28), the Second Circuit, by its decision, has:

> "so far departed from the accepted and usual course of judicial proceedings [and has] ...sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." (Rule 10.1(a)).

In tone, content, and disposition, the decision sought to be reviewed fits within the aforesaid narrow category requiring this Court to protect not only the integrity of the courts, but of our Constitution, and citizens claiming their due process and equal protection rights thereunder.

Moreover, since Petitioners made a specific motion under Rule 60(b)(3) based upon Respondents' fraud, Petitioners respectfully request that this Court, in the exercise of its inherent power to protect the integrity of the judicial process and to safeguard the public, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944), conduct the "independent investigation" authorized by Universal Oil

Products Co. v. Root Refining Co., 382 U.S. 575, 580 (1946), quoted approvingly in Chambers, supra, at 2132, by its own review of Petitioners' aforesaid Rule 60(b)(3) motion.

Such uncontroverted motion is dispositive of every issue before this Court, including Petitioners' right to summary reversal of the Judgment.

Conclusion

The Petition for a Writ of Certiorari should be granted and the Judgment below summarily vacated as a nullity and the decision of the Second Circuit summarily reversed in all respects. Sanctions and new trial relief under Rule 60(b)(3) should be awarded to Petitioners as a matter of law.

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April 12, 1993

SUPPLEMENTAL APPENDIX

EXCERPT FROM PETITIONERS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC, FILED AUGUST 27, 1992 (pp. 10-11)

"The extent to which the District Judge did not meet the standards required for an award under inherent authority is highlighted by the only instances in his Opinion as showing Plaintiffs' alleged bad-faith, cited in the context of §1927 sanctions (at A-14-7).

Because the [Second Circuit's] Decision repeats these instances (at 6391-2) to support fee-shifting for the totality of the litigation, rather than specific conduct to be sanctioned under §1927, they are herein set forth to demonstrate their inaptness for sanctions under any theory:

> (a) "plaintiffs 'attempted to communicate directly with the defendants'" (at 6391): The record shows (AA-47) that the letter to Defendants was not sent by either Elena Sassower or Doris Sassower, but by John McFadden, the former co-Plaintiff and seller of the subject apartment for the stated purpose of effectuating a settlement.
>
> > [fn. #5 hereto: In fact, the District Judge's Opinion acknowledges Mr. McFadden's authorship of the letter to Defendants--the "impropriety" of which it acknowledged "can be overlooked" (A-32).]
>
> (b) "the Magistrate...had recommended dismissal of the complaint because of Doris Sassower..." (at 6391-2): The record shows (see discussion and record references cited in Br. 33-39) that the Magistrate's recommendation and the District Judge's Opinion based thereon were factually unjustified, rendered without due process, and even without a formal motion for Rule 37 sanctions ever made by defense counsel. The lack of due process precludes its use as a basis for a "bad faith" finding against her, a fact recognized by Chambers v. Nasco:

> "A court must...comply with the mandates of due process...in determining that the requisite bad faith exists..., see Roadway Express, supra, at 767, 100 S.Ct. at 2464." Chambers at 2136

(c) Doris Sassower's "role in assisting another attorney " 'in conducting incredibly harassing depositions'", and "'particularly shocking and abusive questioning'" (at 6392): Examination of the transcript shows this statement to be factually false (Br. 39-40), the questions were not improper, and Doris Sassower's entire participation consisted of two wholly innocuous one-line comments: (1) "She doesn't know when she was born." (AA-48); and (2) "Are you serious?" (AA-59).

As a matter of law, the foregoing three instances do not show bad faith to constitute a basis for §1927 sanctions, which is the context in which they were cited by the District Judge, nor do they constitute a basis upon which the Panel could activate the District Judge's inherent power against either Plaintiff, Roadway Express, Inc., at 2465. Indeed, as this Court recognized in Dow Chemical Pacific, at 345, such isolated instances, even were they legitimate, are too inconsequential to sustain an award representing the totality of three year's litigation costs.

Since the District Judge cited no other specific instances of alleged "bad faith", the exception to the "American Rule" cannot be sustained on the basis of his Opinion--and the Panel cited no basis in the record. Indeed, the Decision does not cite the record once."